No. 12849

United States Court of Appeals for the Ninth Circuit.

PATTERSON-BALLAGH CORPORATION, a Corporation, and BYRON JACKSON CO., a Corporation,

Appellants,

vs.

PERRY M. MOSS and PHOEBE E. MOSS,

Appellees.

Transcript of Record

In Three Volumes

Volume I

(Pages 1 to 278)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12849

United States Court of Appeals

for the Ninth Circuit.

PATTERSON-BALLAGH CORPORATION, a Corporation, and BYRON JACKSON CO., a Corporation,

Appellants,

vs.

PERRY M. MOSS and PHOEBE E. MOSS,

Appellees.

Transcript of Record

In Three Volumes

Volume I

(Pages 1 to 278)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

INDEX PAGE

INDEX PAGE

INDEX PAGE

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

LYON & LYON,
REGINALD E. CAUGHEY,
LEONARD S. LYON, JR.,
811 West Seventh St.,
Los Angeles 17, Calif.

For Appellees:

WESTALL and WESTALL,
JOSEPH F. WESTALL,
EDWARD F. WESTALL,
702 William Fox Bldg.,
608 S. Hill St.,
Los Angeles 14, Calif.

In the United States District Court, Southern District of California, Central Division

Civil Action No. 5572-W

PHOEBE E. MOSS,

Plaintiff,

PERRY MOSS,

Nominal Plaintiff,

vs.

PATTERSON-BALLAGH CORPORATION, a California Corporation, and BYRON JACKSON COMPANY, a Delaware Corporation,

Defendants.

SUBSTITUTED, AMENDED AND SUPPLEMENTAL COMPLAINT

(Last Before Trial)

Now comes the above-named Perry M. Moss as a nominal plaintiff and Phoebe E. Moss, plaintiff, and, leave of course having heretofore been granted on pre-trial hearing on February 3, 1948, file their substituted, amended and supplemental complaint, alleging:

I.

That the jurisdiction of this court of the subject matter of this complaint depends upon the fact that the cause of action hereinafter set forth arises under the patent laws of the United States, and particularly as set forth in Title 28, § 41, subdivision (7) of the United States Code, being a suit in equity under said patent laws.

II.

That plaintiff, Phoebe E. Moss, is a citizen of the United States, residing in the city of Long Beach, county of Los Angeles and state of California.

III.

That nominal plaintiff, Perry M. Moss, is a citizen of the United States, residing in the city of Long Beach, county of Los Angeles and state of California.

IV.

That defendant Patterson-Ballagh Corporation was at the institution of this suit, on the 18th day of July, 1946, a corporation organized and existing under the laws of the state of California, and having its principal place of business in the city of Los Angeles, county of Los Angeles and state of California.

V.

That defendant Byron Jackson Company is and has been all of the times alleged in this complaint a corporation organized and existing under and by virtue of the laws of the state of Delaware, with its principal place of business in the state of Delaware, and doing business in the city of Los Angeles, county of Los Angeles and state of California. [24*]

VI.

That on November 27, 1946, the directors of said defendant, Patterson-Ballagh Corporation, certified under oath that said last-named defendant corpora-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

tion "has been completely wound up, known assets distributed tax or penalty paid * * * and its other known debts and liabilities actually paid or adequately provided for, and that said corporation is dissolved." Said last-mentioned dissolution became effective December 3, 1946. And plaintiff alleges that defendant Byron Jackson Company agreed, as the adequate provision above recited, to pay said liabilities, including such sum as may be found due to plaintiff by reason of the infringement hereinafter charged.

VII.

That on the 20th day of February, 1940, there was granted to Perry M. Moss, the original plaintiff in this action, patent No. 2,190,880, for Draw Works Line Controller, of which plaintiff here makes profert, and since said issuance and up to the time of the assignment referred to in the immediately following paragraph of this complaint, continued to be the sole owner of said Letters Patent, which Letters Patent will be produced on the trial of this action.

VIII.

That on the 16th day of January, 1948, the said Perry M. Moss, mentioned in the immediately preceding paragraph hereof, assigned to plaintiff herein, Phoebe E. Moss, his wife, his entire right, title and interest in and to said Letters Patent No. 2, 190,880 by an instrument in writing, executed, acknowledged and delivered on said 16th day of January, 1948, and including in said last-mentioned instrument an assignment to the said Phoebe E.

Moss of the right to recover for past infringement of said Letters Patent, all which [25] will appear from the original assignment to be produced in court. That on the 19th day of January, 1948, a duplicate original of said assignment was forwarded to the United States Patent Office with the proper fee for recording and directions for recording in the Patent Office.

IX.

That on the 4th day of February, 1948, said Perry M. Moss, nominal plaintiff, also assigned to plantiff herein, Phoebe E. Moss, his wife, as her sole and separate property, his entire right, title and interest in and to said Letters Patent No. 2,190,880 by an instrument in writing, executed, acknowledged and delivered on the 4th day of February, 1948, and including in said last-mentioned instrument an assignment to the said Phoebe E. Moss, as her sole and separate property, of the right to recover for past infringement of said Letters Patent, all of which will appear from the original assignment to be produced in court. That on the 5th day of February, 1948, a duplicate original of said assignment was forwarded to the United States Patent Office with the proper fee for recording and directions for recording in the Patent Office.

X.

That after the issuance of said patent No. 2,190,-880, defendant Patterson-Ballagh Corporation for a long time prior to the institution of this suit, and since such institution up to its said date of dissolu-

tion, and defendant Byron Jackson Company, a corporation, since said dissolution of Patterson-Ballagh Corporation and up to the present time, in this division and district and elsewhere in the United States and its possessions, have been directly and contributorily wilfully infringing said Letters Patent No. 2,190,880 granted to said Perry M. Moss on the 20th day [26] of February, 1940, by making, selling and using, and instructing and procuring others to sell and use, Draw Works Line Controls embodying patented invention described and claimed in said last-mentioned letters patent, and particularly, as plaintiff is advised and believes, claims 2 and 7 of said Letters Patent, and said defendant Byron Jackson Company will continue so to do unless enjoined by this court.

XI.

The said grantee of said Letters Patent hereinbefore referred to, Perry M. Moss, has placed the required statutory notice, i.e., "Patent No. 2,190,-880" on all draw works line controllers manufactured and sold by him under said Letters Patent, and has also given written notice to defendants of their said infringement, and since the assignments above described to present plaintiff, Phoebe E. Moss, said last-named plaintiff has not manufactured, but has sold one, of said draw works line controllers.

XII.

That patentee's rights under said Letters Patent and those of his said assignee since said assignment

have been respected, so far as plaintiff is informed, and no manufacturer except defendants in this case has or have infringed.

Wherefore, plaintiff demands a final injunction against further infringement, direct and contributory, by defendant Byron Jackson Company, its officers, agents, employees, associates and confederates, and by those controlled by said defendant, and accounting for profits and damages, an assessment of costs against said defendants and each of them, an allowance of attorneys' fees [27] under the law, and also such other, further or different relief which, to the court, shall seem meet.

PHOEBE E. MOSS,
Plaintiff.

PERRY M. MOSS,
Nominal Plaintiff, by

WESTALL and WESTALL,
JOSEPH F. WESTALL, and
EDWARD F. WESTALL,
Their Attorneys,

By /s/ JOSEPH F. WESTALL.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 4, 1948. [28]

[Title of District Court and Cause.]

DEFENDANTS' ANSWER TO SUBSTITUTED, AMENDED AND SUPPLEMENTAL COMPLAINT

Now come the defendants, Patterson-Ballagh Corporation and Byron Jackson Co., and in answer to the substituted, amended and supplemental complaint filed herein, admit, deny and allege as follows:

I.

In answer to Paragraph I, admit the allegations thereof.

II.

In answer to Paragraph II, admit the allegations thereof.

III.

In answer to Paragraph III, admit the allegations thereof. [30]

IV.

In answer to Paragraph IV, admit the allegations thereof.

V.

In answer to Paragraph V, admit the allegations thereof.

VI.

In answer to Paragraph VI, admit the allegations thereof.

VII.

In answer to Paragraph VII, admit the allegations thereof.

VIII.

In answer to Paragraph VIII, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and therefore deny the same.

IX.

In answer to Paragraph IX, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof and therefore deny the same.

X.

In answer to Paragraph X, defendants deny each and every allegation thereof.

XI.

In answer to Paragraph XI, defendants admit receipt of a written notice of the alleged infringement of the patent in suit by Patterson-Ballagh Corporation in 1940; defendants deny each and every of the remaining allegations thereof.

XII.

In answer to Paragraph XII, deny each and every allegation thereof. [31]

As Additional and Affirmative Defenses, defendants allege:

XIII.

That said Letters Patent 2,190,880, and particularly claims 2 and 7 thereof, which are the claims at issue herein, does not rise to the dignity of invention and constitutes no more than the exercise

of mere mechanical skill and nothing more than a practical oil man would know.

XIV.

Defendants aver that said Letters Patent 2,190,-880 is invalid for failure to comply with the requirements of the statute, § 4888 R. S. (U.S.C. Title 35, § 33), in that the application for said patent did not, and the said patent does not, contain a written description of the alleged invention or discovery and of the manner of making, constructing and using it in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct and use the same; and in that the patentee failed particularly to point out and distinctly claim in said patent the part, improvement or combination which he claims as his invention or discovery.

XV.

Defendants aver that said Letters Patent 2,190,-880 was and is void and of no effect in law in that the alleged invention purported to be patented thereby does not constitute patentable knowledge or invention within the meaning of the patent laws in view of the prior state of the art and in view of what was common knowledge on the part of those skilled in the art, all prior to the time of the alleged invention of the said Letters Patent by the applicant therefor. [32]

XVI.

That said Letters Patent 2,190,880 is invalid and void because the applicant, Perry M. Moss, was not the original and first inventor or discoverer of any material or substantial part of the thing patented and that every material or substantial part thereof and therein claimed as new was invented by other prior to the alleged invention thereof by said Perry M. Moss and particularly by John E. Reed, now residing in Santa Maria, California, and as described in Reed patent 2,238,398, issued April 15, 1941.

XVII.

That said patent, and particularly claims 2 and 7 thereof, is invalid because John E. Reed, patentee of patent 2,238,398, while employed by the Union Oil Company at Belridge, California, as early as April, 1936, and prior to the date that said plaintiff made the alleged invention embodied in the patent in suit, conceived the invention thereof and manufactured and used and caused to be used a line spooler on Union Oil well Belridge No. 20 on or about April 15, 1936, embodying the construction as claimed in said Moss patent, and particularly claims 2 and 7 thereof.

XVIII.

That Patterson-Ballagh Corporation, more than two years prior to the filing date of the application resulting in the issuance of the patent in suit and prior to the reduction to practice or manufacture and sale by the patentee Moss of any line spoolers

embodying the alleged invention of said patent, manufactured and sold line spoolers as shown in the photograph attached and made Exhibit 1 hereto and that one of said line spoolers was installed in a well near Avenal, California, in July, 1936, in the manner shown in said Exhibit 1; that Exhibit 1 is a photograph taken in July of 1936 of a Patterson-Ballagh line spooler installed in an oil well rig near Avenal, California, and [33] in the manner shown therein; that said Patterson-Ballagh line spoolers were sold to the public and were publicly used in the oil industry, including the line spooler in Exhibit 1, more than two years prior to the filing date of the Moss application resulting in the issuance of the patent in suit.

XIX.

Defendants aver that the claims of said Letters Patent, and particularly claims 2 and 7 thereof, are ambiguous, and if such ambiguity can and shall be truly, correctly and lawfully resolved by references to the specification of said patent, the proceedings had in the Patent Office leading to the grant of said patent and to the art existing at and prior to the alleged invention of the subject matter of said claims by said Perry M. Moss, said claims, and each of them, will be legally susceptible only of such limited interpretation, scope and meaning that no act done or intended to be done by defendants can be justly and lawfully held to constitute infringement of said claims, or either of them.

XX.

That the patent in suit, including the claims thereof and particularly claims 2 and 7 in issue herein, is invalid because said claims fail to comply with the provisions of § 33 of Title 35 of the United States Code in that said claims are indefinite and fail to distinctly point out and claim the alleged invention or discovery.

XXI.

That the patent in suit, and the claims thereof and particularly claims 2 and 7 in issue herein, is invalid because said claims at the point of novelty therein do not specify structure but solely function and the result obtained or desired and therefore fail to comply with the provisions of § 33 of Title 35 U.S.C. [34]

XXII.

That each and every of the elements covered by the claims of the patent in suit, and particularly claims 2 and 7 thereof, are shown in Reed patent 2,238,398 except the placing of an eye adjacent the top of the line spooler to which a suspension line may be attached; that the placing of an eye on the line spooler to attach a suspension line thereto is merely a matter of choice and the hanging or inclination of the line spooler because of the attachment of said suspending line is merely a matter of degree and that no unusual or unexpected result occurs from the placing of the eye adjacent the top of the line spooler which would cause said placing in conjunction with the use of said suspension line to rise to the dignity of invention.

XXIII.

That the defendant, Patterson-Ballagh Corporation, manufactured and sold line spoolers to oil companies and particularly oil companies drilling oil wells and that said line spoolers were installed in the well rigs by the operators thereof without instructions to said operators or knowledge by Patterson-Ballagh Corporation as to whether the users of said line spoolers would install the same to cause said line spoolers to assume an angle of inclination coincident with the wire line threaded therethrough because of the manner in which said line spoolers were suspended by means of a suspension line attached to an eye thereon; that as manufactured and sold by Patterson-Ballagh Corporation said line spoolers did not embody the alleged invention of the claims in issue.

XXIV.

That defendant, Byron Jackson Co., prior to its acquisition of the assets of Patterson-Ballagh Corporation never manufactured, sold and/or used line spoolers; that subsequent thereto said defendant corporation has never manufactured, sold or [35] used line spoolers wherein the suspension line was suspended from an eye at the top of the line spooler as shown in the drawings of the Moss patent in suit.

XXV.

Defendants aver that plaintiffs are estopped to assert infringement by defendants, or either of them, or to maintain this action by reason of their long delay and laches in bringing this action and

with said plaintiffs having full knowledge of the alleged infringing activities of the defendant, Patterson-Ballagh Corporation; that said Patterson-Ballagh Corporation, relying upon the inactivity and delay of plaintiffs in bringing said action, continued said alleged infringing activities and changed its position to its detriment; that the defendant, Byron Jackson Co., is the successor in interest of said Patterson-Ballagh Corporation and prior to acquiring all of the assets of said corporation was the owner of a substantial amount of the issued stock of said defendant, Patterson-Ballagh Corporation; that the long delay and laches on the part of plaintiffs inures to the benefit of said defendant, Byron Jackson Co.

Wherefore, Defendants pray:

(a) That the patent in suit, and particularly claims 2 and 7 thereof, be held invalid and void and not infringed by defendants;

(b) That the complaint herein be dismissed with prejudice; with costs to defendants and that defendants have execution therefor;

(c) That the defendants have such other relief as to the court seems meet and just.

LYON & LYON,

/s/ R. E. CAUGHEY,
Attorneys for
Defendants. [36]

[Endorsed]: Filed January 12, 1948.

EXHIBIT 1

[Title of District Court and Cause.]

STIPULATION AS TO USE OF COPIES OF PATENTS

It Is Stipulated by and between the parties to the above-entitled action, through their respective attorneys, that uncertified printed copies of the specifications and drawings of Letters Patent of the United States and photostatic copies of the specifications and drawings of foreign Letters Patent, furnished by the United States Patent Office, shall be received in evidence with the same force and effect as duly certified or exemplified copies of said Letters Patent, subject only to their admissibility under the pleadings and relevancy and materiality to the issues, and subject to correction if any errors appear therein by the production of duly certified or exemplified copies; and that the recitals appearing on such copies in stating the dates on which the respective applications therefor were filed and the respective patents issued, shall be received as prima facie evidence of such facts so recited, subject to correction by reference to certified or exemplified copies, if any errors therein appear.

This stipulation may, but need not, be filed.

Dated at Los Angeles, California, this .... day of September, 1947.

WESTALL AND WESTALL,

By /s/ JOSEPH F. WESTALL,

Attorneys for Plaintiff.

/s/ R. E. CAUGHEY,

Attorney for Defendant.

[Endorsed]: Filed January 12, 1948.

[Title of District Court and Cause.]

OPINION

This cause arises under the patent laws of the United States; the original complaint was filed by Perry M. Moss, as inventor and patentee, against Patterson-Ballagh Corporation, as the alleged infringer, for damages, etc., for infringement of Letters Patent No. 2,190,880. Since the filing of that complaint, Perry M. Moss has assigned to Phoebe E. Moss, his wife, all his right, title and interest in and to said Letters Patent, including the right to recover for past infringement of said patent, and Byron Jackson Co. has acquired the assets of Patterson-Ballagh Corporation and has assumed any liability of said Corporation. Appropriate amendments have been made to the pleadings.

The device described in the patent in suit, as well as other devices used or manufactured for [42] similar purposes, have been designated variously in the pleadings and evidence as "draw works line guide or controller," "wire line guide," "line controller," "wire line spooler" and "spooler"; for this memorandum we will call all of said devices "spoolers" unless another of said names is used.

The Moss Letters Patent were issued to Perry M. Moss on February 20, 1940, after application filed January 21, 1938.

The defendants have stated they are manufacturing their spoolers under a license agreement with

J. E. Reed, whose Letters Patent No. 2,238,398 were issued April 15, 1941, after application filed May 22, 1937.

At the trial of the case plaintiff Phoebe E. Moss appeared and testified on behalf of plaintiff; Perry M. Moss was unable, because of illness, to appear, and his testimony was presented by deposition; in addition to these witnesses, plaintiff called seven men of long experience in the operation of oil wells, none of whom appeared to have an interest in either the Reed or Moss patents.

Defendant offered the testimony of J. C. Ballagh, president of Patterson-Ballagh Corporation, and Vice-President of Byron-Jackson Co., a man of long experience in the manufacture and sale of oil well tools; Allen E. Hambly, expert witness, patent attorney for defendant Byron Jackson Co., J. E. Reed, licensor of Patterson-Ballagh Corporation for the use of the Reed Patent, and E. F. Prehoda; Reed and Prehoda were also men of long experience in the operation of oil wells.

The evidence shows that a standard oil well derrick is usually about 100 feet high, with the height on a slant of 122 feet, and with a 24 feet square base, inside measurement. A winding drum is placed on one side of the derrick floor, [43] and from this drum runs a wire line or cable, which unwinds upward to the derrick top where it passes over appropriate mechanism and downward to the hole. On the end of this line is attached the drilling or other heavy tool; as the tool is run in the cable unwinds from the drum and as the tool is pulled

up the cable winds on the drum. As the number of layers of cable helices increase or decrease on the drum the slant of the line will vary consequently; the rapid rotation of the winding drum will cause considerable vibration or wave motion to be produced in the cable, causing successive waves to travel up and down the span; these waves, due to the weight of the cable and the rapidity of the winding motion of the drum cause a lateral motion of the cable of considerable extent sufficient to result frequently in the cable "jumping" the drum, and to prevent its normal winding up neatly, or being spooled neatly upon the drum. The vibrations of the cable were designated by witnesses experienced in oil well drilling operations as "the whip of the line."

Early attempts were made to control these vibrations by the use of various devices, including that known as a "chain spooler."

Such device consisted of a piece of chain which had three to six links and with the wire line being threaded through a central link. A rope or wire line was tied to each end of the chain and each of said lines was threaded through a pulley from which the line hung down toward the floor of the derrick, with a counterweight attached to the end. This type of spooler was not successful. It eliminated some of the vibrations, but the chain caused the wire drilling line to wear out rapidly, and sparks flew from the contact of the wire with the chain, thus creating a danger to the workers on the rig. [44]

The Moss device and the alleged infringing device have operated successfully to check vibrations so that the line is spooled neatly, friction on the drilling line is reduced for longer wear, and the hazards of operation theretofore present removed.

A model to scale of the device made by plaintiffs under the Moss patent is Exhibit No. 4, and it was introduced into evidence installed in a model derrick, Exhibit No. 3.

A model to scale of one of the alleged infringing devices manufactured by defendants is Exhibit N.

The device shown in the Moss patent, the device shown in the Reed patent and the alleged infringing device are of similar construction except that the defendants' device and the Moss device show an eye at the top for attaching a hanging line, or suspension line, while the Reed patent shows an eye in the longitudinal center for a hanging line. The spooler originally manufactured by the defendants is similar to that shown in the Reed patent; there is no contention by plaintiffs that this device, with the eye for the hanging line in the middle, infringes their patent.

Counsel in their argument have stated, and the Court agrees, that the Reed application shows each and every element of the Moss patent, except that in the Moss patent the suspension, or hanging line of the spooler is attached to an eye at the top instead of, as in the Reed patent, an eye at the middle, or longitudinal center. Counsel are also agreed that the question before us is whether Moss' hanging line at the top constitutes invention.

The Moss patent describes a spooler which consists of a semi-cylindrical shell of metal in two sections, joined along one side, and openable. Inside the shell are a series of aligned, spaced, semi-cylindrical blocks of rubber having [45] an axial bore slightly larger than the drilling line or cable, and through which said line passes in winding or unwinding from the drum. Each bearing block is small compared to the length of the shell and is separately replaceable by opening the shell; from opposite sides of the shell are V or elbow arms (17) of metal whose divergent ends are rigidly attached to the top and bottom of the device on each side; the convergent ends of each of these arms is completed by a bar (18) of V-shape telescoped in the arm pipe ends, and secured. This bar provides the place of attachment through which are attached "harness bridles" or lines (15) and (16) on each side, which are rove over guide pulleys attached in the derrick; the ends of these lines hang over the outside of the derrick on each side, and equal weights are suspended from them.

An eye (17a) on the upper limb portion of each of the V arms (17) is shown, "for the attachment of suspending lines if such an arrangement is more adaptable to given cases of operation."

An eye (13) is affixed at the top of the shell "and to this eye is attached * * * the suitable suspending element" the upper end of which is attached up in the derrick. This we call the "hanging line."

The patent further recites that the hanging line is secured in such a position in the rig that the

suspended shell will be in a position to "axially coincide" with the slanting line running from the top pulley to the drum, "that is so that the shell and the cable line have a common coaxial position tangent to the drum." The patent further recites:

"In other words, the draw-line shell is hung with its center of gravity on the axis of a given line and with [46] its axis normally, that is while free, substantially coincident with the axis of the introduced cable body. In such position the shell is balanced to tilt in a vertical plane on a transverse axis through its center of gravity and does not impose noticeable resistance on the line to hold its own obliquity."

The Reed patent describes a similar, openable shell lined with similar rubber blocks, similarly replaceable; the V arms (17) of the Moss patent have their equivalent in Y cables connected through radially extending ears two at the top (one on each side) (31), (32) and two at the bottom (33), (34). These cables at their convergent ends meet on each side by being attached to a ring (38) and from these rings, on each side, extend cables which similarly are disposed over pulleys to hang with an equal weight on each cable end, outside the derrick.

An eye or ear (28), "preferably located centrally with respect to the length of the housing member" receives one end of a supporting cable, "by which the spooler may be freely suspended from the derrick."

The Reed patent further recites:

"As will be hereinafter more fully described, it is necessary that the cable be permitted considerable latitude of motion in the direction of the longitudinal axis of the winding drum, so that the line of cable may be wound in a series of coils or a helix along the face of the drum and hence the guide or spooler constructed in accordance with my invention must be adapted to allow free movement of the cable in this direction. For this purpose I prefer to suspend my spooler or guide upon a relatively long length of cable, in the assumed example described herein the spooler being preferably suspended approximately 40 feet upon the winding drum [47] upon a cable which is approximately 40 feet in length * * * By suspending the spooler at its approximate longitudinal center, it will be apparent that the spooler will hang freely with its longitudinal axis disposed in substantial alignment with the direction of the extent of the span of the cable and will not require a bend or offset of the cable as it passes through the spooler."

The Moss patent contains 9 claims, but while the complaint charges infringement generally of the patent, counsel for plaintiffs have stated that there is no contention that infringement has been committed except as to claims 2 and 7 of the Moss patent.

Claim 2 reads:

"A draw works drum line controller body having an elongate, line receiving bore, a pair of opposite lateral control devices each including parts diverging toward the opposite ends of and connected to

said body to stabilize it against vibration on its minor axis in the plane of said devices, and a suspension means connected to said body at a point eccentric to the major axis and adjacent to one end of the body to support the body in normal position with the bore substantially parallel and contiguous to the line for reception thereof substantially without load of the body on the line when this is in a vertical plane transverse to the axis of the draw works drum."

Claim 7 reads:

"A draw line control apparatus including a shell structure, bearing means mounted in the shell, means for suspending the shell to receive [48] and pass the said draw line, bridle means extending toward opposite sides of the shell, and oppositely directed arms rigidly secured to the shell and to which the said bridle means are respectively connected; said suspending means including a device hitched to the shell at a point eccentric to its bore to cause the shell to hang at a desired angle from the vertical; and said shell consisting of elongate opposed sections, and band parts secured to said sections and having connected hinge eyes at one side of the shell and opposed lugs for fastening means at the opposite side of the shell."

The Reed patent contains 3 claims. Claim 2 of the Reed patent is as follows:

"In a guide for damping vibrations in a long span of traveling cable, a housing member including a pair of complementary semi-cylindrical elongated housing members, each having longitudinally ex-

tending flanges thereon, by which said members may be assembled together, lining means for said housing defining a restricted longitudinal bore through said guide, through which said cable may freely travel, means on at least one of said housing members near the longitudinal center thereof by which said guide may be suspended for substantially free lateral movement with respect to the direction of travel of said cable, and guy means associated with said housing for restricting the lateral movement of said guide."

The Reed file wrapper, showing the application for the patent and further proceedings in the Patent Office, was [49] introduced in evidence as Plaintiffs' Exhibit 11; the Moss file wrapper as Plaintiffs' Exhibit 12.

The file on the Moss patent shows that correspondence was had between the Patent Office and counsel for Moss over a period of about 2 years; that other patents and applications were considered, including the Bell, DePeel, Gill, Swan and Sawtelle patents; the file on the Reed patent also shows references to the patents last above named, as well as others.

It appears from the Reed file that after the allowance of the Moss patent, and on June 4, 1940, while the Reed application was still pending, the present counsel for the defendants, who represented Reed in his application, communicated with the Patent Office, wherein they asked that Reed be permitted to amend his application to include Claim 23, as follows:

"23. A draw works drum line controller body having an elongate line receiving bore, a pair of opposite lateral control devices each including parts diverging toward the opposite ends of and connected to said body to stabilize it against vibration on its minor axis in the plane of said devices, and a suspension means connected to said body at a point eccentric to the major axis to support the body in normal position with the bore substantially parallel and contiguous to the line for reception thereof substantially without load of the body on the line when this is in a vertical plane transverse to the axis of the draw works drum."

The communication further stated that the amendment [50] had been copied from Moss patent, claim 2 thereof, except that the amendment omitted the recital that the suspension means is connected "adjacent to one end of the body." It was requested by said counsel in said communication that an interference be declared between applicant's claim 23 and Moss patent claim 2, and it was stated:

"On April 17, 1940, assignee of the present application received a notice charging infringement by the device of this application of the Moss patent, and an interference proceeding appears to be the proper mode of determining any issue of priority that may exist."

The file also shows the reply of the Patent Office to the communication above mentioned, wherein the Patent Office stated in part:

"* * * Therefore proposed claim 23 presented by applicant without the limitation 'and adjacent to

one end of the body' in reference to the position of the 'suspension means' omits a relevant part of claim two of Moss and upon which the last 5 lines of function in claim 2 depends. Applicant's device as disclosed in this case has no suspension means adjacent to one end of his body but provides his suspension means at the center of his body. The function in the last 5 lines of claim 23 is not accomplished by applicant's device and is not disclosed in this case * * *''

''* * * claim 2 of Moss is considered to be patentably different from proposed claim 23 * * *'' [51]

No appeal was taken from this decision of the Patent Office.

The evidence is that Perry M. Moss, in his work in the oil fields, for many years experienced trouble with the whipping of the line, and finally conceived the idea of his spooler; that on or about May 16, 1936, he related in detail his idea for a spooler, as later shown by his model in evidence, to A. M. Anderson, who was in charge of production for the Holly Oil Company, Moss' employer; that later he showed Anderson some sketches of his spooler; about November 22, 1936, Moss obtained some materials from a Mr. Terry who was employed at the same well as Moss, and from these materials Moss constructed a full-size spooler similar to that shown in the model; Mrs. Moss, his wife, assisted him in laying it out, but most of the work was done by Moss at home in his garage. About November 25, 1936, Moss showed the shell of the spooler to Mr.

Terry, and Terry later saw this spooler installed in a well.

The first test of the spooler after its completion was made in a well of the Holly Oil Company, under the supervision of A. M. Anderson, on April 5, 1937, at Huntington Beach, California. The Court takes judicial notice that Huntington Beach was, at that time, and had been for many years previous thereto, the center of great activity in the oil well drilling industry, and that said city is about 34 miles from Los Angeles, California.

Moss stated in his deposition that he had not secured a test of his spooler prior to April of 1937, because after he completed it in the latter part of November, 1936, he wanted to wait until he had an opportunity to test it in a well under the supervision of someone with whom he was acquainted, where he would get a fair deal. [52]

Another test of the Moss spooler was made in a well of the Republic Petroleum Company at El Segundo, California, in July or August of 1937.

Several witnesses employed on the respective wells where the tests were made gave clear evidence to the effect that the spooler was hung at the top in the manner shown by the model of the Moss spooler and derrick and that the spooler operated successfully.

The required statutory notice was placed upon the devices manufactured and sold by plaintiffs under said patent, and on April 17, 1940, plaintiffs gave notice to defendants of plaintiff's charge of infringement.

With reference to the history of Reed's invention, he testified that he had used chain spoolers as late as 1935, which chains he suspended in some instances by two ropes tied upward to a girt in the derrick, and in other instances by a loop about eight feet above the chain with a line from the top of the loop to a girt up in the derrick; that in 1935, he constructed a light wooden spooler, about 18 inches long, and this spooler was suspended from its top to the third girt above in the derrick, by two lines; another spooler of wood soaked in oil was similarly suspended. None of these spoolers were successful; the chain caused sparks, the wood wore out too quickly, and caused dust to fly; in March of 1936, he tried out a rubber spooler, but used no suspension means.

In April of 1936, he made an affidavit of invention, Exhibit D, witnessed by Mr. Prehoda, a man who worked with Reed; this affidavit showed a spooler with rubber inserts, side bridles, weights, but had no suspension line; a short slack line was attached to the derrick, the line being designated a safety line "to prevent the dropping of [53] the spooler should the counterweight ropes break." This invention was turned over to Reed's employer, Union Oil Company, and was released to Reed in January, 1937. The next spooler made by Reed, according to his testimony, was one of pipe split longitudinally, with rubber inserts, side bridles and counterweights, and a slack or hold down safety line which was attached to the rig below the spooler.

The pipe was bolted together with a bolt on each side at the top and a bolt at each side at the bottom. Reed testified a suspension line was made by tying a piece of rope from the bolts on each side at the top, then another rope from the center of this loop, which rope led upward and was attached to the third girt of the derrick above the spooler; this spooler was used on Belridge No. 20, a well of the Union Oil Company, in July of 1936. A sketch of this spooler, as testified to by Reed was drawn by him, and is Exhibit B.

Reed constructed another spooler in August of 1936; and drew a sketch, Exhibit C, to illustrate this device; he stated it was made of pipe, had rubber inserts, side bridles with counterweights, and bolts at the top and bottom on each side. As a suspension means, Reed testified he used a loop with each end fastened on the top bolts on each side of the spooler; a pulley was placed in the center of the loop, and from this pulley a single line went up to the third girt above the spooler, where another pulley was attached; from the second pulley, the line went down outside the rig, and on the end of the line was a counterweight; a slack or hold down line was attached to the bottom of the spooler.

Reed testified that this spooler last made took most of the whip out of the line.

Mr. Prehoda corroborated some of Mr. Reed's testimony concerning the use of the Reed spoolers, but was evidently confused between the "suspension" means and the [54] "safety line." While

Reed testified that the safety line was attached to the bottom of the spooler, Prehoda testified that the saftey line was attached to one of the eyes at the top of the spooler and the other end of this line was attached 45 feet up in the derrick. Mr. Prehoda also testified concerning the first Patterson-Ballagh spooler he saw and stated that this spooler had a "saftey line" from the center eye of the spooler and attached 21 feet above the spooler to the derrick. Both Reed and Prehoda testified that the Patterson-Ballagh spooler was suspended by two lines tied to the top eyes of the spooler to form a loop over the top, from the center of which loop a line went up to the third girt above the spooler.

Reed testified that he never heard of Mr. Moss until 1944, and never saw one of his spoolers until 1947. Reed further stated that he first installed one of the Patterson-Ballagh spoolers like the one pictured in Exhibit H, in a well in July of 1937; that he hung this spooler on a line attached to the center of a loop made by tying each end of a rope through the ears at the top on each side of the spooler; that the middle eye was used for attaching a safety line.

Reed further stated that he hung the Patterson-Ballagh spooler in this manner, in July of 1937, instead of from the middle eye, because that was the normal way to hang anything to have it hang perpendicularly; that his previous wooden spoolers had been hung in such a manner and that the chain spoolers were also tied from the top; that when he

hung the Patterson-Ballagh spooler from the top it functioned to take the whip out of the line.

Mr. Reed also stated that he had no conception of [55] hanging at the top when he made his affidavit of invention in April of 1936, but was interested in the wear of the rubber and in keeping the waves out of the line so as to spool it perfectly.

In January of 1937, Reed conferred with J. C. Ballagh, and learned that Ballagh had, in December of 1936, filed an application for a patent on a spooler; Ballagh became convinced that Reed was the true inventor, and the former withdrew his application, and on May 10, 1937, entered into an agreement for the use of Reed's device as shown in the patent application thereafter filed by Reed. On May 22, 1937, an application identical with that formerly filed by Ballagh was filed with Reed named as inventor, and on April 15, 1941, as heretofore stated, the Reed Letters Patent were issued; Reed has been, since the agreement mentioned, receiving a royalty on the rubber used in the manufacture of defendants' spoolers.

We have no testimony concerning any experiments by Mr. J. C. Ballagh which led to the filing in December of 1936, of his application for a patent on the spooler which was afterwards described in the Reed patent, but it appears that the first one of these spoolers was manufactured by Patterson-Ballagh Corporation in, or shortly prior to, June of 1936. A photograph of this spooler was identified as Exhibit H. This spooler, which

we will call the first type of Patterson-Ballagh spoolers, is in appearance similar to the drawing in the Reed patent the photograph shows the bridle lines attached, and a line attached to the middle eye, which line is coiled upon the floor near the spooler. Mr. Ballagh stated that three dozen, at the most, of these spoolers were manufactured, and less than two dozen sold. In July of 1936, one of these spoolers was shipped to Bakersfield, California, [56] to the Reserve Oil Company.

Mr. Ballagh testified at one portion of his testimony that the eye was put in the middle of the spooler for the purpose of attaching a safety line to keep the spooler from dropping down in the event the hanging lines would break; in another portion of his testimony, Mr. Ballagh stated that it was not necessary to the spooling of the line that there be any suspension line at all; at another portion of his testimony, Mr. Ballagh stated that the line shown attached to the middle eye of the early Patterson-Ballagh spooler was either a hanging line or a safety line, and that it was called a hanging line in the Patterson-Ballagh advertisements; that a hanging line and a safety line were the same thing.

Mr. Ballagh further related that in 1936 and 1937 he made trips through the oil fields, and received many suggestions from men in the field that the Paterson-Ballagh spooler would operate better if it were hung from the top by two lines, instead of from the middle; that in August, 1936, he visited a well of the Reserve Oil Company and observed the spooler which had been delivered to said Com-

pany, and noted that the spooler was suspended from two hanging lines at the top of the spooler, with no line attached to the middle eye; that he took a photograph of the spooler as it appeared in the rig, which photograph is Exhibit K.

An examination of Exhibit K discloses one of the first type of Patterson-Ballagh spoolers; side bridles are attached to the eyes or ears at the top and the bottom, and in the bridle ears at the top on each side two lines attached which lead upward toward the top of the derrick; the photograph does not show where the other ends of these lines are attached, neither does it show how far up into the derrick [57] these lines go; they do not appear to be taut; it is impossible to tell from the photograph whether the weight of the spooler is resting on these two lines, whether they are "hanging" or "safety" lines, or whether such weight is borne by the chains which are attached to the side bridles.

The evidence shows that sometime in July of 1937, Patterson-Ballagh begun to manufacture their second type of spooler; this spooler was of the same general construction as the first, except that it had, in addition to the middle eye, an eye at the top of the spooler, and another in between the top and middle eyes. Mr. Ballagh testified this change was made in response to suggestions received from men in the field as heretofore mentioned.

The first advertisement (Exhibit 25) published by Patterson-Ballagh showing their new spooler appeared in the October 21, 1937; the cut of the spooler was stipulated by counsel to have been

printed upside down in this advertisement, but viewed right side up it shows a taut line extending upward from the middle eye, and no lines attached to either of the two eyes above the middle eye; an advertisement dated December 30, 1937, Exhibit 26, shows the second type of spooler, with a line leading downward from the middle eye, marked "hold down safety line" and a line attached to the top eye marked "hanging line"; a third type of spooler is shown in an advertisement dated November 18, 1938, Exhibit 10-K, this spooler being of a shorter length, with metal arms instead of the bridle ropes, with an eye at the top with attached line labelled "hanging line," no line in the middle eye, and an eye at the bottom with a line marked "hold down safety line." Other advertisements show spoolers with the line in an eye at the top marked "hanging line" under dates of December 1, 1938, April 25, 1940, and such spoolers with [58] the "hanging line" attached to an eye at the top, similarly labelled, appear in Patterson-Ballagh catalogues for 1942, 1944, 1945 and 1947.

Directions for the installation of the spooler in the catalogues stress the importance of lining the hayfork pulleys which hold the bridle ropes so they are in line with the drilling line, and of lining the spooler up so that its center will be exactly lined up with the hayfork pulleys; the cut of the spooler in the 1947 catalogue shows a line attached to the top eye, while arrows leading from this eye and the eye next below it point to the designation "hanging loops at the center of gravity"; directions

for installation state that the hanging line must be high enough so that the frame hangs freely about the drilling line so that there will be no side pull when in operation. "This is important," the directions continue, "If necessary, add to the hanging line, as same must be vertical, if the linings are to show a long life." The catalogue above mentioned also contains a statement to the effect that the Patterson-Ballagh spooler has become standard equipment with most operators, and that "thousands are in service throughout the U. S. A."

The commercial success of this spooler is fully established by the evidence.

Mr. Ballagh further testified that since July of 1937 Patterson-Ballagh Corporation and its successor in interest, Byron Jackson Company, have continued to manufacture and sell spoolers similar to Exhibit N, their model in evidence, with an eye at the top; that during the past two years they have been recommending that the spoolers be hung from a line attached to the center of the loop, the loop being formed by a line having each end attached to the eyes or ears at each side of the top of the spooler, as this has [59] been found to be a better method than the hanging line from a single eye at the top.

Defendants in their answer have denied infringement, and have set forth in Paragraphs 13 to 25, inclusive, various affirmative defenses, which, with the exception of that of laches which counsel for defendants withdrew at the trial, have been epitomized by counsel in their brief:

"The defendants rely upon the following defenses which were raised by the answer filed to the supplemental complaint:

"1. That the patent in suit is invalid because nothing is involved other than the exercise of mere mechanical skill and that which was obvious to those skilled in the art.

"2. That the defendant, Patterson-Ballagh Corporation prior to the date of invention of Moss, manufactured and sold wire line controllers embodying the invention of the claims in issue which were publicly used prior to said date of invention in the United States.

"3. That John E. Reed, prior to the date of invention by Moss, conceived the invention of the claims in issue and reduced it to practice and publicly used the same.

"4. That the specifications of the patent and the claims do not comply with the requirements of § 33 of Title 35 of the United States Code.

"5. That the defendants have not infringed the claims in issue.

"6. That the claims in issue were so limited during the prosecution of the application for the [60] Moss patent that the plaintiffs cannot now contend that the claims have such a scope as to cover defendants' structure."

We shall discuss, first, subdivision 4 which relates to the question of whether the specifications and claims comply with the requirements of Section 33 of Title 35, USCA. Under this category, defendants have criticized the use of the word "substan-

tially'' in the Moss patent. It is interesting to note that when defendants' counsel requested of the Patent Office that the Reed application be amended to include claim 23, said claim included the word ''substantially'' used in the same manner as that of Moss claim 2, and we observe that neither counsel, at that time, nor the Patent Office, when it considered the Moss application, found any uncertainty presented by the use of such word.

It was said in Bianchi v. Barili, 108 F. 2d, a decision of the Court of Appeals of the 9th Circuit, from which we quote at page 799:

''In the first place, considerable latitude in semantics is permitted to an invention. As was said in H. J. Wheeler Salvage Co. v. Rinelli & Guardino, D. C. N. Y. 295 F. 717, 727, 'a patentee has the right to use such words as to him best describe his intention, and they will be so construed as to effectuate that result.'

''Second, the specification and the claims of the patent are not to be construed with legalistic rigidity. Here as elsewhere in the law, 'the letter killeth, but the spirit giveth life.' ''

In Application of Curley, 158 F. 2d 300, it was stated at page 304 that the word substantially is a relative [61] term and ''should be interpreted in accordance with the context of the claim in which it is used.''

We feel that this defense merits little attention. A reading of the Moss patent leaves no doubt that, as required by the statute, the invention has been

described so as "to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected," to make and use the Moss spooler to obtain the results specified.

Contrasted with defendants' contention just discussed is their defense outlined under Subdivision 1, that the Moss invention involved nothing more than the exercise of mechanical skill, and was obvious to those skilled in the art. In support, defendants' counsel in their brief quote portions of the testimony of some of plaintiffs' witnesses, and from such portions counsel would convince us that any practical man in the field would know that a spooler should be "hung from the top." Our recollection of the entire testimony of these witnesses as they spoke from the stand, refreshed by a reading of their entire testimony in the transcript, does not lead us to ascribe to such testimony the meaning which counsel gives it. Their entire testimony leads us to the conclusion that they meant that any practical oil man, now, as of today, would know the spooler would hang better from the top; several of these witnesses testified that they had worked with Patterson-Ballagh spoolers of the early type, and that these spoolers were hung in the middle, and were off balance; we find no instance where any one of these witnesses testified that he, himself, hung one of the middle-eye spoolers from the top instead of the middle because such a method was obvious to him, as a practical man; and not one of them testified that he had ever seen a spooler [62] hung

from an eye or eyes at the top before he saw the Moss spooler.

As further evidence that the Moss method of hanging is obvious, counsel point to the photograph of the Patterson-Ballagh spooler taken in August, 1936, while installed in a well of the Reserve Oil Company near Bakersfield, California. As we have mentioned elsewhere, this photograph does not present conclusive evidence regarding the hanging of the spooler, and neither does the testimony of Mr. Ballagh concerning it, especially in view of the fact that he was evidently confused at the trial as to the difference between hanging lines and safety lines.

Again, on the point that the hanging of the spooler by an eye at the top was obvious to those skilled in the industry, reference is made to Mr. Ballagh's testimony that in 1936 and 1937 he received suggestions from men in the field that the spooler would hang better if it were hung at the top, and two lines used instead of one.

Keeping in mind that less than two dozen of those first middle-eye spoolers were sold during 1936 and 1937, and also noting that no one of the practical men of the field who made these suggestions was produced by the defendants to tell us whether they arrived at this method of hanging because it was obvious, or because they had heard of the Moss invention, disclosed in May of 1936 and tested and subsequently used in April of 1937, we are inclined to discount this hearsay testimony. First if any suggestions were made to Mr. Ballagh in 1936 that his middle-eye spooler was not satisfactory, and

should be hung from the top, with two lines, instead of the middle, or that another eye should be added, it would seem reasonable that he would have followed such suggestions in his own application filed in December of 1936, [63] and, secondly, if such suggestions were made to him prior to May 22, 1937, it is logical to suppose that he would have caused the Reed application, which was actually the Ballagh application with the name changed, and under which Ballagh had taken out a license, to be drawn so as to include this superior method of hanging instead of the middle eye method.

While it would have been simple to give the industry the benefit of these suggestions by changing the Patterson-Ballagh advertisements of the middle eye spooler to direct that the same be hung in the "obvious" method allegedly disclosed by the Reserve Oil Company photograph of August, 1936, we find a complete absence of any mention of this method in the advertising exhibits for the ten years subsequent to the date last cited.

Instead, we note that the Patterson-Ballagh advertisements continued to depict the middle eye with line attached until December of 1937. On that date their "really new wire line guide" with the top eye and the hanging line attached was shown. We note that the latter spooler was manufactured within a few months after, and within 34 miles of the place where the success of the Moss spooler had been demonstrated. All of which would indicate that if suggestions from men in the field led to the addition of the top eye to the Patterson-Ballagh

spooler, such suggestions originated not from those who found it obvious, but from those who had seen or heard of the Moss method of hanging at the top.

As offering additional support to the theory that Moss' top eye was obvious, mention is made of the testimony of Reed concerning the old chain spoolers and the wooden and rubber spoolers made by Reed. We do not attach importance to Reed's testimony as to the method of suspension of the old chain spoolers; such testimony was not supported by [64] the other practical man of the oil fields produced by the defendants, Mr. Prehoda; it was contradicted by several of plaintiff's witnesses. It was evident that Prehoda, in his testimony, also became confused between hanging lines and safety lines.

In our opinion the fact that the record of invention made by Reed in April of 1936 contained no mention of a hanging line of any sort, the fact that his application for a patent filed May 22, 1937, contained no mention of a hanging line or lines attached at the top of the spooler, either from one eye, or from ears or eyes at each side of the top, provide a clear refutation of his testimony that he hung his chain spoolers in 1935, his wooden spoolers in 1935, his rubber spoolers in 1936 from lines attached to the top of the spoolers because that was "the normal way to hang anything" to make it hang perpendicularly, instead of hanging it in the middle.

Four patents, the application for the earliest one having been filed in 1923, the Gill, Posey, Bell and Smith patents, were introduced in evidence by de-

fendants to show the state of the art before and at the time of the Moss application. The first three patents disclose no hanging lines, and the file wrappers of the Moss and Reed patents show that these patents were considered by the Patent Office with reference to both applications. The Smith patent was stressed as supporting the point that the Moss invention was obvious and constituted merely an exercise of mechanical skill. The latter patent, application for which was filed January 4, 1937, was not pleaded in anticipation of the Moss patent, and we see no similarity between the respective devices, except that the Smith device, as well as the Reed device, and the Moss device, each has a hanging line or lines. [65]

The patents introduced as above mentioned serve only to indicate the attempts of those skilled in the art to create a device which Moss succeeded in perfecting.

We are indebted to a recent decision of the Court of Appeals for the 9th Circuit, R. W. Pointer v. Six Wheel Corporation, decided September 27, 1949, reported at 177 F. 2d 153, for an illuminating discussion on the question of novelty as opposed to that which is produced by a mere exercise of mechanical skill. The opinion, written by District Judge Leon R. Yankwich, also contains citations of many cases which likewise assist us in considering the problem before us.

It is stated in the R. W. Pointer case just mentioned that whether there is invention is a question of fact, and that so is the determination of the

question whether there is presented some uncommon advance in the art or mere exercise of "the skill of the calling."

To guide the Court in deciding these questions of fact, the reported decisions have suggested various weights which may be laid upon the scales; not the least important of these is the heavy burden which is borne by one attacking the validity of the patent, especially one who has offered contest of that patent in the Patent Office. (Radio Corp. v. Radio Laboratories, 29 U. S. 1, 7-8; Morgan v. Daniels, 153 U. S. 120, 125.)

We have no testimony as to the number of years that the difficulties cured by the Moss patent had persisted to plague the oil drilling industry prior to the experience of the various witnesses, but the DePeel patent, referred to in the Moss file by the Patent Office as prior art, was granted in 1913. References in the Moss and Reed files, to prior patents, as well as the testimony at the trial shows [66] that much effort had been expended by others in the direction taken by Moss, and that such effort was not productive of satisfactory results. There is evidence that while the spoolers in use prior to the construction of the top eye spooler were of some value in partially stopping the whip of the line, the evidence also is clear that they did not succeed completely in this regard, and their use resulted in great wear on bearings and drilling lines; that the Moss and Patterson-Ballagh top eye spoolers were the first spoolers to stop the whip of the line, and to insure proper spooling with very little wear on

the line and bearings. The Patterson-Ballagh top eye spoolers are shown by the evidence to be in use in the majority of oil well drilling operations and to be practically standard equipment for such work.

That the Moss method of hanging might now appear obvious to those who have seen it, is to be expected; in fact, one of the practical men of the oil field testified that after he saw the Moss spooler, he couldn't understand why he, himself, didn't think of it before. It was stated at P. 931 in Ray-O-Vac v. Goodyear Tire and Rubber Co., 45 F. S. 927 (affirmed, 136 F. 2d, 159):

"If a particular result has long been desired and frequently sought but never attained, ordinarily we may not attribute lack of invention to the device which first achieved the desired result, because it seems that the simplicity of the means is so marked that many believe they could readily have produced it if required. The Barbed Wire Patent (Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 284). Though the device be simple, and it may seem strange [67] that earlier makers should have failed to take the final step needed to convert their experiments into assured success, the simplicity will not preclude invention. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403 (citing other cases). * * *"

See also: Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 434.

Paraphrasing some of the language of Judge Learned Hand in Safety Car Heating & Lighting Co. v. General Electric Co., 155 F. 2d, 937, 939, also

cited in the R. W. Pointer case, supra, we have considered "the circumstances which preceded, attended and succeeded the appearance of the invention," "the length of time the art, though needing the invention, went without it," "the number of those who sought to meet the need, and the period over which their efforts were spread" and the "extent to which it superseded what had gone before," and find, as did the Patent Office after its careful consideration, that the Moss device shows invention. (See also: Paramount Publix Corp. v. American Tri Ergon Corp., 294 U. S. 464, 474; Schering Corp. v. Gilbert, 153 F. 2d, 428, 432.)

Subdivision 2 of the synopsis of affirmative defenses mentions that Patterson-Ballagh corporation prior to the date of invention of Moss, manufactured and sold wire line controllers embodying the invention of the claims in issue, and that such devices were publicly used in the United States prior to said date of invention.

There is no contention that Patterson-Ballagh manufactured any spooler earlier than June, 1936, or, possibly, just prior to the date of the photograph, Exhibit H; this spooler, shown in the Reed patent, was the middle eye spooler and did not embody the hanging eye at the top shown by [68] the Moss claims in suit. But counsel for defendants insist that the 1936 spooler just mentioned, when hung from the two top bridle ears embodied the invention of the claims in suit, and that such use was shown by the testimony in connection with the Reserve Oil Company photograph, Exhibit K.

We have analyzed the testimony with reference to this exhibit in our discussion on invention, and the conclusions there reached make it unnecessary to accord further attention to this defense.

Under Subdivision 3 of their synopsis of defenses, counsel for defendants have referred to the allegation in their answer at Paragraph 17, which is to the effect that the Moss patent, particularly claims 2 and 7, is invalid because John E. Reed, prior to the date of Moss' invention, conceived the invention thereof and manufactured and caused to be used a line spooler on the Belridge No. 20 Union Oil Well, on or about April 15, 1936, which line spooler embodied the construction as claimed in said Moss patent, and particularly claims 2 and 7 thereof.

The earliest date which the evidence discloses Reed used a spooler on the Belridge No. 20 well was June or July, 1936; the testimony is that this spooler was not entirely successful in taking the whip out of the line, was used only until August, at which time Reed constructed his second type of spooler (with the hanging line going over a pulley, and a weight at the end of the line outside the derrick), which latter spooler was used on another well in August, 1936, and sometime later in the year, on a re-deepening job on Belridge 20.

Counsel for the defendants in their brief characterize the Reed record of invention of April 15, 1936, as a "conception" and the making of the spoolers used on the [69] Belridge No. 20 well in

June or July of 1936 and thereafter during 1936 as a reduction to practice of such conception.

In our discussion on the question of invention, we have given our appraisal of the testimony with regard to the hanging, by Reed, of his spoolers used on Belridge No. 20. As we have heretofore stated, no hanging line of any sort was shown in Reed's record of invention; and whatever the position of attachment of the hanging line or lines on Reed's spoolers above mentioned, such feature cannot be connected up as a reduction to practice of any conception evidenced by the record of invention, nor, for that matter, can the Reed application or patent as far as the hanging line thereof, be connected with said record of invention.

In connection with Subdivisions 2 and 3 of the synopsis, counsel for defendants assert that the earliest date of invention which Moss can claim is April 5, 1937, the date of actual reduction to practice, and that should he seek to carry his date of invention back to his date of conception on May 16, 1936, he would be barred because of a failure to exercise due diligence during that period.

The oft-cited case of Automatic Weighing Machine Co. v. Pneumatic Scale Corp., 166 F. 288, is quoted as authority on this point; counsel for plaintiffs, referring to "Interference Law and Practice by Rivise and Caesar (1940)," Volume 1, chapter XIII, page 537, maintain that the question of diligence is important only in the case of a party who was first to conceive the invention but who did not reduce it to practice until after his opponent had

done so. In Hann v. Venetian Blind Corporation, 111 F. 2d, 455, 459, the opinion of the Court of Appeals, 9th Circuit, quotes from the Automatic Weighing Machine Co. case, in connection with the statement: [70]

"We are not unmindful of the rule that where two parties have reduced an invention to practice, the one who first conceived and disclosed the invention and with reasonable diligence connected his conception with its reduction to practice is the 'original and first inventor' under the statutes, without regard to which of the two first completed the reduction to practice."

We are inclined to agree with counsel for the plaintiffs that the question of diligence is not important here because no evidence has been introduced in this case to show any race between rival inventors, but since counsel for defendants have asked for a finding on this subject, we will consider the same.

Conception is defined in Townsend v. Smith, 36 F. 2d, 292, as being established "when the invention is made sufficiently plain to enable those skilled in the art to understand it." (See also Cooper v. Hubbell, 53 F. 2d, 1072, 1077.)

Reduction to practice is defined in Hann v. Venetian Blind Corporation, 111 F. 2d, 455, 458, as being accomplished when a "machine is assembled, adjusted and used."

Counsel seem to agree that the date of Moss' conception was May 16, 1936, when he disclosed his invention to Anderson, and we so find. The evidence

is also clear that Moss completed the construction of his spooler in November, 1936, except that he had not fully decided at that time whether he would use rubber or wood for bearings; that between November of 1936 and April 5, 1937, he inserted rubber bearings, arranged for a test of his device, procured and took to the well of the Holly Oil Company in Huntington Beach, California, the ropes, pulleys and counterweights [71] used in operating his completed device.

As was said in Powell v. Poupitch, 167 F. 2d, 514, "The question of diligence is one which must be determined by consideration of the particular circumstances of each individual case." We are also of the opinion that the circumstances of the particular individual may be considered with reference to this question.

In Moss' case, he was a driller employed on the rig. He did not have the authority of Reed, drilling superintendent for the Union Oil Company, or Anderson, in charge of production for the Holly Oil Company. The drilling for oil is an industry wherein mistakes are costly, and it is not to be supposed that a test of a new device in connection with the drilling cable would be undertaken without the sanction of those in charge of such operations. Moss held no position entitling him to insist that his device be tested, and it was important that the test be undertaken by someone he could trust, who would give him a "fair deal." His first test was secured through the person to whom he had made

his first disclosure. Under all the circumstances, we find no lack of diligence in his conduct.

Directed to their defense set forth in Subdivision 5 of their synopsis of defenses, that of non-infringement, defendants introduced evidence "directed to the proposition that Patterson-Ballagh spoolers were not hung so that the angle of inclination allowed the line to pass freely through the spooler, as it would be normally hung." Mr. Hambley, patent attorney of defendants, computed the angles of inclination of the three sizes of defendants' spoolers. He stated that the angle of inclination of the Patterson-Ballagh spooler, when suspended from a line attached to the top eye and fastened thirty feet above the spooler in the [72] derrick was, for the four section spooler, 14 degrees off the vertical, or 10 degrees offset from the drilling line, the six section spooler, 9 degrees off the vertical, or 5 degrees offset from the drilling line, and the two section spooler, 30 degrees off the vertical or 26 degrees offset from the drilling line. Counsel for defendants argue that the degree of inclination from the drilling line as to each of these spoolers is too great to permit the drilling line to run freely through it, and maintained that the defendants do not infringe "because they do not so hang their spoolers so that there is no friction on the line."

It is further argued that Mr. Moss testified that his spooler has an angle of inclination two or three degrees offset from that of the drilling line, and that if the claims in suit are interpreted so that the words "a suspension means connected with said

body at a point eccentric to the major axis and adjacent to one end of the body to support the body in normal position with the bore substantially parallel and contiguous to the line for reception thereof" (emphasis supplied) mean that the spooler is suspended so as to hang at no greater angle of inclination than two or three degrees offset from the drilling line, then none of the spoolers manufactured by the defendants infringe.

It was further testified by Mr. Hambley that a Patterson-Ballagh spooler hung in the derrick by a hanging line attached to the top of a loop each end of which was fastened to the two top ears of the spooler had no angle of inclination, but was vertical, and thus, figuring the slant of the drilling line as 4 degrees, the spooler was offset only 4 degrees from the drilling line.

It was argued by counsel for defendants that if "substantially" as used in the Moss claims meant an offset [73] from the drilling line greater than the 2 or 3 degrees mentioned by Mr. Moss, then such a spooler would be covered by the method of hanging shown in the Smith patent and the Reserve Oil Company photograph, Exhibit K, and the claims would thus be invalid.

We have already commented upon the Smith patent and the Reserve Oil Company photograph in our discussion on validity.

There was also some argument between counsel for the parties as to the meaning of the words "normal position." Mr. Hambley interpreted "normal position" to mean the position the spooler

naturally assumes when freely suspended without any line passing through the bore or any restraining force acting on it other than gravity; counsel for defendants ascribed a similar meaning, counsel for plaintiffs stated that when hanging line was attached to the top eye, and the spooler tied up to such a girt as to make the bore substantially parallel with the line, a "normal position" as nearly as could be gotten would be achieved. We note that the Patent Office, in refusing the Reed amendment, stated that one of Moss' objects was to provide a spooler which in its "normal working position" forms a guide along the axis of the cable so that the cable may run quite free from bearing contact pressure. (Emphasis supplied.)

There are several reasons why we feel that Mr. Hambley's testimony is not pertinent to the issues before us. We are unable to reconcile the factors which Mr. Hambley used to obtain his angles of 5, 10 and 26 degrees with the statements of Mr. Moss as to the manner in which he obtained his angle of 2 or 3 degrees. Mr. Hambley assumed a 30 feet hanging line, and a drilling line with a slant of 4 degrees off the vertical. Mr. Moss testified that the hanging line would be 30 or 40 feet long depending upon the position of the drum, and reiterated several times his statement that the hanging line must be placed "high enough so it will hang as near as it will hang" to the inclination of the drilling line; also the evidence is not clear that Mr. Moss meant that the angle of 2 to 3 degrees was present when the spooler was hung from the hanging line with-

out the bridle ropes and pulleys, or was present when the spooler was in actual "working" position.

Even if we accept Mr. Hambley's computations as correct, we must label them as inconclusive; they were, to borrow a phrase from Weiss v. R. Hoe & Co., 109 F. 2d 722, p. 726, in the nature of "ex parte tests" not made when the devices were in operation, nor in fact, in actual "working" position.

Mr. Hambley further testified (Tr. 465)" * * * the normal angular tilt of the axis of the spooler is so [74] that, when you locate that eye with respect to the axis, and when you determine what length the spooler is going to be, at that instant you have determined what its normal suspended position will be and it doesn't matter one bit how high up you go * * * you can't change the normal suspended position of that spooler by attaching it at a higher or lower point in the derrick. That is determined by the dimensions of the spooler when it is manufactured."

This testimony seems to be at variance with the emphasis placed by Patterson-Ballagh directions on hanging their spooler as shown in their catalogues, particularly their 1947 one:

"Fasten the hanging line to the exact center of one of the upper girts, (generally 30-40 feet above the third girt) high enough so that the frame hangs freely about the drilling line. Be sure there will be no side pull on the guide when put into operation. This is important. (Emphasis found.) If necessary, add to the hanging line, as same must be vertical if linings are to show a long life."

Also in contrast with the language of these directions, and with the claims in the Patterson-Ballagh advertisements of a "freely hanging guide" are the statements of counsel for defendants during the trial that the degree of inclination of each of the Patterson-Ballagh spoolers is too great to permit the drilling line to run freely through it, and that defendants "do not hang their spoolers so that there is no friction on the line." [75]

In Eibel v. Paper Co. 261 U. S. 46, the Supreme Court considered the effect of the use of the word "substantially," and in said case expounded many principles of patent law which are pertinent to the case at bar on the question of infringement and also upon validity. In the Eibel patent, the object of the invention was "to construct and arrange the machine whereby it may be run at a very much higher speed than heretofore to produce a more uniform sheet of paper which is strong, even and well formed," and the device was described as being an improvement on the Fourdrinier machine; invention, according to the specifications, consisted in causing the paper stock to travel by gravity in the direction of the movement of the making-wire and approximately as fast as the making-wire moved. "To accomplish this result in a simple manner," read the specifications, "the breast-roll end of the paper-making wire is maintained at a substantial elevation above the level, thereby providing a continuous downwardly moving paper-making wire * * *"

Some of the claims in question used the words

"substantial elevation." The Supreme Court in its opinion at page 58 referred to the fact that the prior art showed a three-inch elevation of the breast roll, and its sole purpose was drainage. On the question of invention, the Court commented that while some of the witnesses testified that they had used or seen used elevations of four, five or six inches, that written records showed no more than three inches. The Court remarked that "the amount of elevation rested in a memory running back more than ten or fifteen years, a memory stimulated by the subsequent high pitches of Eibel and the retrospect of the progress that now seems so easy and clear to everyone * * *" Continuing, at page 60, it was stated: [76]

"* * * The temptation to remember in such cases and the ease with which honest witnesses can convince themselves after many years of having had a conception at the basis of a valuable patent, are well known in this branch of the law, and have properly led to a rule that evidence to prove prior discovery must be clear and satisfactory * * *"

Mention was also made in this decision, at page 65, of the question whether or not the patent was too vague in its terms because the extent of the factor of pitch was not defined except by the terms "substantial" and "high"; the Court noted that the figure accompanying the specification and illustrating the improvement indicated an angle of four per cent, or an elevation of 12 inches, and stated that the reference to the small elevations in prior

patents for drainage purposes only indicated that the patentee had in mind elevations substantial as compared with them in order to achieve his purpose of substantially increasing the speed of the stock; that it was difficult for him to be more definite due to the varying conditions of speed and stock existing in the operations of the Fourdrinier machines, and the necessary variation in the pitch to be used to accomplish the purpose of his invention.

The defendant used a Fourdrinier machine having the breast roll at an elevation of 15 inches above the level, and such machine caused the paper to move rapidly in the direction of the movement of the wire and at a speed approximately equal to the speed of the wire "substantially as described" in plaintiff's patent. The Court held that Eibel's patent was valid, and infringed. [77]

In Robins v. Wettlaufer, 81 F. 2d 882, the question was whether a screening machine with its drive shaft over 7 inches away from the center of gravity came within the claim which read in part (p. 884):

"A screening apparatus comprising a screen frame, a drive shaft substantially coincident with the center of gravity * * *"

The drive shaft of the other device being considered was one-half inch away from the center of gravity. The Court, reading the specifications, commented that the primary conception of both parties was to construct a single actuating shaft screen which would be evenly balanced and free from destructive and noisy vibrations, which was

to be accomplished by a combination of features including the drive shaft, and that the location of the drive shaft must be considered in connection with the other elements of the invention. Deciding in favor of the first mentioned machine, the Court stated that the same had successfully operated to produce the new and useful results of the subject matter of the counts of the interference, and that it satisfied the same, and that the element in issue contributed to that result, holding, (p. 893):

"If the actuating shaft be close enough to the center of gravity of the frame so that the objects of the invention are accomplished and its proposed new and useful results attained, then the shaft may be held to be 'substantially coincident' with the center of gravity."

See also: Valvona-Marchiony Co. v. Marchiony, 207 F. 308; Engineer Co. v. Hotel Astor, et al., 226 F. 779, 780; Pittsburgh Iron & Steel Foundries v. Seaman-Sleeth Co., 236 F. 756; Hazeltine Corporation, et al., v. A. H. Grebe & Co., [78] Inc., 21 F. 2d 643, 645, which are to the effect that the word "substantial" should be interpreted in the light of the results sought and accomplished.

It is admitted by defendants that all elements of their device are identical with those of the Moss patent except the eye at the top for the hanging line.

It is our opinion that there is also identity in that respect.

It is certain that the eye at the top of defendants' device is placed so as to accomplish the objects of

the Moss patent, and to attain the proposed new and useful results claimed by the Moss patent; it is likewise certain that defendants' spooler hangs with its bore "substantially parallel and contiguous to the line for reception thereof" and it is also certain that the Patterson-Ballagh spooler operates "substantially without load of the body on the line when this is in a vertical plane transverse to the axis of the draw works drum."

Viewing the defendants' device and its results with the claims in suit and the results claimed by the patent, we are inclined to feel that the controversy over the word "substantial" in this case makes most appropos the language used by the Court in Bianchi v. Barili, 168 F. 2d 793, p. 801:

"* * * infringement is a question of fact * * * It is also a question of substance, and not of nomenclature. It is not to be settled by striving to ascertain the difference between tweedledum and tweedledee."

In Union Paper Bag Machine Co. v. Murphy, 97 U. S. 120, 125, it was stated: [79]

"* * * the correct rule being that, in determining the question of infringement, the court or jury, as the case may be are not to judge about similarities or differences by the name of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the

same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result." See also: Soco-Lowell Shops v. Reynolds, 141 F. 2d 587.

Under Subdivision 6 of their summary of defenses is defendants' contention that the claims in issue were so limited during the prosecution of the same before the Patent Office that they cannot now be said to cover defendants' structure. Under this heading it is argued that the Moss claims should have the limited interpretation that the spooler must coincide with the angle of inclination of the wire line with not more than 2 or 3 degrees deviation.

We find no merit in this contention.

It is our opinion that Claim 2 of the Moss patent is valid, and is infringed by the devices which have been, and are being manufactured by defendants.

With reference to Claim 7 of the Moss patent, we find that it is valid, and is infringed except as to the band parts. Counsel on either side have not devoted enough [80] attention in presenting evidence, argument or authorities on this feature to justify our discussing the same in detail. We think that plaintiffs are entitled to the benefit of the presumption of validity afforded by their patent, (Morgan v. Daniels, 153 U. S. 120, 123) which defendants have not overcome. On the other hand, plaintiffs have not sustained their burden to

prove that as to these parts, defendants have infringed. (Price v. Kelly 154 U. S. 669.)

Plaintiffs should have judgment for an injunction, accounting, damages, interest and attorney's fees.

We have not been furnished with sufficient points and authorities or discussion by counsel to enable us to decide at this time whether damages for wilful infringement should also be awarded, and suggest that counsel for plaintiffs prepare findings, etc., in the light of this opinion, leaving open the finding on the last mentioned subject, and submit the same in accordance with the rules of this Court, within 20 days from this date. In the meantime, counsel for the parties may file further briefs and written argument on the question of wilful infringement if they so desire, within ten days from date hereof. Also within ten days from date hereof counsel for plaintiffs should submit detailed statements of work done referable to the amount to be awarded as attorneys' fees.

Dated this 21st day of February, 1950.

/s/ JACOB WEINBERGER,
United States District Judge.

[Endorsed]: Filed February 21, 1950. [81]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS AND CONCLUSIONS

Now come the defendants in the above-entitled action and make the following objections to the findings of fact and conclusions of law proposed by the plaintiffs in the above-entitled action.

Findings of Fact

I.

Defendants object to the proposed finding IX upon the ground that as written it is a conclusion of law and upon the further ground that any finding upon the question of infringement should identify which of the defendants' structures are found to embody the invention of claim 2 in issue. [93]

The record (383-386) shows that Patterson-Ballagh Corporation prior to the filing of the action herein manufactured and sold spoolers of varying lengths, i.e., 16 inches, 32 inches and 48 inches, with all of said spoolers having the same internal and external diameters. There is therefore before the court the three types of Patterson-Ballagh spoolers which are charged to infringe and any finding upon the question of infringement should be specific as to the particular types. Such a finding would be helpful to an appellate court if an appeal is taken from any judgment entered herein.

Furthermore, the record in the cited pages shows that Patterson-Ballagh Corporation did not install or use any of the types manufactured and sold by

it. The record is clear that the crews of the purchaser made the installations and that ordinarily counterweights and the hay fork pulleys were not supplied (R. 386). Therefore the finding, as worded, that the defendants had directly and contributorily infringed is not in accordance with the facts nor is that part of the finding correct or in accordance with the evidence which sets forth that the defendants used any line spoolers. We have heretofore filed a memorandum relative to the question of wilful infringement and objection is made to the inclusion of any such language in said finding.

Furthermore, the record shows (381-382) that subsequent to the filing of the action the manner of hanging spoolers had been changed by defendants so that two hanging lines are used instead of one. This particular construction was only commented upon briefly in Mr. Ballagh's testimony and there is in fact no substantial evidence before the court as to what this particular construction is or how it functions and particularly where the hanging line is attached or how long the same may be. Under rule 15(d) of the federal rules of civil procedure transactions or occurrences or events happening subsequently to the filing [94] of the complaint should be reached by a supplemental pleading; particularly if the construction charged to infringe is different from that charged to infringe when the complaint was filed. The defendants have had no opportunity to present any defense in connection with a construction wherein two hanging lines are used and, if plaintiffs con-

tend that such construction does infringe, the defendants should have an opportunity of interposing defenses thereto and being heard thereon. The deposition of Mr. Moss taken September 8, 1947, clearly shows that the Patterson-Ballagh structures charged to infringe were those having one hanging line at the top and that there was no question of infringement where two hanging lines were involved.

Proposed finding IX should therefore be restricted to the three types of Patterson-Ballagh spoolers charged to infringe as shown by the deposition of Mr. Moss and by the testimony in this court. If the plaintiffs' content the present type of hanging is an infringement, then it should be reached by a supplemental or other proper pleading and with the defendants being given the opportunity to meet said issue.

II.

Objection is made to proposed finding X on the ground that there is no proof in the record as to when the plaintiffs placed the required statutory notice upon any spoolers sold by Perry M. Moss; nor is there any proof in the record that such required notice was placed thereon prior to the written notice of infringement addressed to defendant Patterson-Ballagh Corporation; this question can properly be considered upon any accounting and if the statutory notice is effective prior to written notice this can be established. However such finding is not in accordance with the evidence now before the court. [95]

III.

There is no evidence to support proposed finding XI. This is merely a negative finding and does not mean anything. Such a finding should not be made by the court in the absence of positive evidence as to the existence of other manufacturers of spoolers or as to how they hung said spoolers.

IV.

Objection is made to proposed finding XII on the ground that the record shows that Perry M. Moss was not the inventor of the subject matter described in the patent in suit. No objection, in view of the court's decision, would be made to a finding that stated that Perry M. Moss was the inventor of the combination claimed in claims 2 and 7 in issue.

V.

Objection is made to proposed findings XIII to XXII, inclusive, upon the ground that these findings are drawn in the negative and in that respect are similar to findings which have been sometimes presented in state court actions. The court has rendered a forty-page decision in this action and it would appear that there are sufficient facts stated so that the plaintiffs can draw findings which would be positive in nature and therefore of more assistance to a court on appeal. It would appear from the opinion that this court raised a question as to whether prior uses pleaded were sufficiently proven. There is a distinction between such a question and the question as to whether facts were established

which might bear upon other defenses presented in the pleadings, for example, the issue of whether more than mechanical skill was involved in the claims in issue.

Furthermore, there is no justification for many of the assertions in said proposed findings XIII to XXII, inclusive. For example, in proposed finding XXII there is the assertion [96] that constructive notice was given promptly after the issuance of the patent in suit. As previously pointed out, there is no evidence before the court as to this. Furthermore, the question of delay in filing the action is charged to defendants, in effect, whereas the record clearly shows that although there were negotiations for settlement that the plaintiff and her predecessor in interest were free at all times to bring any suit for infringement that they may have desired. The bald assertion that any delay in filing the suit was caused by misrepresentations of the defendants is absolutely unsupported.

Conclusions of Law

Defendants object to the conclusions of law as follows:

VI.

Objection is made to proposed conclusion I upon the ground that no claims are in issue except 2 and 7 and that any finding as to validity should be restricted specifically to said claims. Furthermore, the conclusion should be clear that the subject matter referred to therein refers to the claim as a combination. The court will recall it was ad-

mitted by the parties that if any invention resided in the Moss patent it had to do with the method of hanging the line at the top and in such a manner as to be covered by said claim.

VII.

Objection is made to proposed conclusion III on the ground that it is a finding of fact.

VIII.

Objection is made to proposed conclusion IV on the ground that it is a finding of fact.

IX.

An objection is made to proposed conclusions V, VI, VII and VIII, on the ground that they are findings of fact. [97]

X.

Objection is made to proposed conclusion X on the ground that the conclusion of law as to infringement should be tied in with a specific finding of fact which would identify the accused structure.

Further objection is made to proposed conclusion X upon the ground that the infringement is stated to be wanton and wilful and that the plaintiffs are entitled to recover treble damages. In view of the memorandum previously filed, it is not necessary to comment further herein on this particular question.

XI.

Objection is made to proposed conclusions XI and XII upon the ground that § 70 of Title 35 of

the United States Code does not confer attorneys' fees upon the prevailing party as a matter of right. A memorandum will be filed herein by defendants covering this particular question.

XII.

Objection is made to proposed conclusion XIII on the ground that it does not identify the structures charged to infringe except in general language and said structures are not further identified in the proposed findings. It would be impossible from the findings and conclusions to determine what should be enjoined.

XIII.

Objection is made to proposed conclusion XIV on the ground that under § 70 as now worded there is no recovery for profits and any recovery should be limited to the provisions of that section.

The objections to the proposed Judgment are in accordance with the objections heretofore made to the findings and [98] conclusions. We see no object in making objections to said judgment in view of the objections made herein. Defendants' position is that the proposed judgment should be modified in accordance with said objections, including any elimination of wilful infringement or an increase of damages.

LYON & LYON,

/s/ R. E. CAUGHEY,

Attorneys for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed March 6, 1950.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(First filed February 28, 1950, and now re-written to conform to briefs, etc., filed April 28, 1950.)

Findings of Fact

As findings of fact the Court finds that:

I.

The cause of action set forth in the complaint in the above-entitled suit arises under the patent laws of the United States being a suit in equity under said patent laws.

II.

Plaintiff, Phoebe E. Moss, is a citizen of the United States, residing in the city of Long Beach, county of Los Angeles, and state of [101] California.

III.

Defendant Patterson-Ballagh Corporation, was at the time of the institution of this suit, on the 18th day of July, 1946, a corporation of the state of California, having its principal place of business in the city of Los Angeles, county of Los Angeles, and state of California.

IV.

Defendant Byron Jackson Company was, at the time of the trial of this action, and has been at all

times alleged in the complaint in this action, a corporation of the state of Delaware, having its principal place of business in the state of Delaware, and doing business in the city of Los Angeles, county of Los Angeles, and state of California.

V.

That on November 27, 1946, the directors of said defendants, Patterson-Ballagh Corporation certified under oath that said last-named defendant corporation "has been completely wound up, known assets distributed tax or penalty paid * * * and its other known debts and liabilities actually paid or adequately provided for, and that said corporation is dissolved." An endorsement on the file wrapper of No. 40,655, in the Corporation Department of the state of California at Los Angeles indicates actual dissolution as of December 13, 1946. Defendant Byron Jackson Company, as the adequate provision above recited, promised to pay said liabilities, including such sum as may be found due to plaintiff by reason of the infringement charged in the complaint.

VI.

On February 20, 1940, there was granted to Perry M. Moss, the original plaintiff in this action, patent No. 2,190,880, for Draw Works Line Controllers, and since said issuance and up to the time of the assignment referred to in the immediately following finding of fact hereof, continued to be the sole owner of said Letters Patent. [102]

VII.

Said Perry M. Moss is and was at all time mentioned in the complaint and Amended and Substituted Complaints, a citizen of the United States.

VIII.

That on the 4th day of February, 1948, the said Perry M. Moss, mentioned in the immediately preceding paragraph of these findings, assigned to plaintiff herein, Phoebe E. Moss, his wife, his entire right, title and interest in and to said Letters Patent No. 2,190,880, by an instrument in writing, executed, acknowledged and delivered on said 4th day of February, 1948, and including in said last mentioned instrument an assignment to the said Phoebe E. Moss of the right to recover for past infringement of said Letters Patent, which assignment has been duly recorded in the records of the United States Patent Office in Liber W214, page 64.

IX.

After the issuance of said patent No. 2,190,880, defendant Patterson-Ballagh Corporation, for a long time prior to the institution of this suit, and since said institution up to the date of dissolution of said corporation, in this Division and District and elsewhere in the United States and its possessions, and said Byron Jackson Company, a corporation, since said dissolution of defendant Patterson-Ballagh Corporation, and up to the time of the trial of this action, in this Division and District and elsewhere in the United States and its posses-

sions have been directly, and contributarily, wilfully infringing said Letters Patent No. 2,190,880, granted to aforesaid Perry M. Moss by making, selling, using and instructing and procuring others to sell and use Draw Works Line Controllers embodying the patented invention described in Claim 2 of said last-mentioned Letters Patent in suit; [103]

X.

The said grantee of said Letters Patent in suit No. 2,190,880, namely, Perry M. Moss, has placed the required statutory notice, i.e., "Patent No. 2,-190,880" on each and all of the Draw Works Line Controllers which he manufactured and sold under said Letters Patent; and has also given written notice prior to the institution of this action to each of the defendants named in the complaint of the said infringement; and since the assignment of said Letters Patent and right to recover the past damages resulting in infringement of said Letters Patent up to the time of the trial of this action the present plaintiff, Phoebe E. Moss, has continued to so manufacture and so mark.

XI.

In the light of evidence of record, John E. Reed was not a prior inventor of the subject-matter described and claimed in the Moss patent in suit.

XII.

The written description of the specification of said patent in suit No. 2,190,880 is sufficient as a

written description of the invention and discovery of the manner of making, constructing, and using it in such full, clear, concise and exact terms as to enable any person of skill in the art to which it appertains to make, construct, and use the same; and claims 2 and 7 thereof, distinctly claim the patentability of the subject-matter thereof.

XIII.

That nominal plaintiff, Perry M. Moss, was the first and true inventor of the subject-matter covered by claims 2 and 7 of said Letters Patent in suit No. 2,190,880. [104]

Conclusions of Law

As matters of law the Court concludes:

I.

The Letters Patent in suit No. 2,190,880, granted February 20, 1940, for Draw Works Line Controllers to Perry M. Moss as to claims 2 and 7 of said patent, involved invention; and said Perry M. Moss was the original, sole, first and true inventor of the subject-matter thereof.

II.

The Letters Patent in suit No. 2,190,880, were regularly issued and delivered to said patentee, Perry M. Moss.

III.

Notice of the granting and issuance of said Letters Patent were both constructively, by marking

and in writing, given to the defendants in this action prior to its institution.

IV.

The written description of the specification of said patent in suit No. 2,190,880, is sufficient under the law as a written description of the invention and discovery of the manner of making, constructing, and using it in such full, clear, concise and exact terms as to enable any person of skill in the art to which it appertains to make, construct, and use the same; and the claims 2 and 7 thereof, distinctly claim the patentability of the subject-matter thereof.

V.

In the light of the evidence of record in this action, any alleged prior manufacture, use or sale asserted to have been made of the subject-matter of the claims of the patent in suit, did not constitute any prior use or uses of the subject-matter covered by the claims of the said Moss patent in suit and particularly claims 2 and 7 thereof. [105]

VI.

The claims of the Moss patent in suit, and particularly claims 2 and 7 thereof are not functional; but, on the contrary, describe and claim and cover the structure of a line spooler.

VII.

Plaintiff, Perry M. Moss and his assignee, Phoebe E. Moss have not been guilty of inexcusable delay or laches in instituting and prosecuting this action.

VIII.

Since the grant and issuance of said Letters Patent and within six (6) years prior to the institution of this action, defendants and each of them have been guilty of direct and contributory infringement, and such infringement has been wanton and wilful; and plaintiff is entitled to recover treble damages and interest under Title 35 and §67 of the U. S. Code.

IX.

Plaintiff, Phoebe E. Moss, is entitled under the law, Title 35 §70 of the U. S. Code as amended August, 1946, to invoke this court's discretion to award to her attorneys' fees in this action.

X.

Plaintiff's reasonable attorneys' fees under the law is fixed at the sum of ..... Dollars.

XI.

Plaintiff is entitled to an injunction in due and proper form restraining defendants and each of them, their officers, employees, agents, and those in privity with any of them, and their confederates, from making, advertising, selling or offering for sale any of the devices or parts thereof found to infringe the Moss patent in suit.

XII.

This cause is referred to a master of this court, namely, to ....., to take an accounting of damages, reasonable royalty, interest and

other recovery to which plaintiff [106] is entitled under these findings and conclusions and report the same to this court.

Signed this ....day of ...., 1950.

....,
United States District Judge.

Lodged September 18, 1950. [107]

[Title of District Court and Cause.]

MEMORANDUM ON OBJECTIONS TO FINDINGS AND CONCLUSIONS

Judge Weinberger's Calendar, September 15, 1950.

At the request of the Court, counsel for the parties have filed proposed findings and conclusions, and discussion of such findings and conclusions has been had, both in the form of briefs, and orally, in court. The Court has now drawn its own findings and conclusions which are being filed herewith.

Referring to proposed findings of plaintiffs filed April 28, 1950, the Court is incorporating findings I, II, III, IV, V, VI, VII, VIII into its own findings in a more abbreviated form.

Referring to plaintiffs' proposed finding IX, we are of the opinion that plaintiffs have included therein [113] both findings and conclusions; this finding has been separated, and a portion mention-

ing infringement used in the Court's conclusions. The devices which plaintiffs claimed at the trial to have been manufactured by the defendants in infringement of the Moss patent are described; it is the Court's belief that the description given in its finding covers all of the devices which plaintiff claimed at the trial were infringing devices.

Regarding plaintiffs' proposed finding X, it appears that this finding as drawn by plaintiffs' counsel is also partly a conclusion; this finding has been re-worded to state the actual fact.

As to finding XI, the same is being used, except that the Court has omitted the word "prior," and limited the finding to claims 2 and 7.

Finding XII is incorporated in the Court's findings, with slight change in the wording.

Finding XIII is used, except that the Court has substituted the word "sole" for "first and true."

A finding as to claim 7 has been added, following suggestions of both counsel.

Plaintiffs' proposed conclusion I, the second phrase thereof (as to Moss being the first and true inventor), was included in the findings, as heretofore noted, with the word "sole" used instead of "first and true"; but as counsel for plaintiff desire it to be both a finding and a conclusion, and defendants have made no objection, the Court has included this statement in the conclusions also.

Conclusion II is used as found in Plaintiffs' proposed conclusions.

Conclusion III is included in the Court's conclusion No. VI. [114]

We agree with counsel for defendants that plaintiffs' conclusions IV, V and VI can be covered by a conclusion of validity and have made such a conclusion, V.

Plaintiffs' conclusion V is included in the Court's findings.

Referring to Plaintiffs' conclusion VII, as we have heretofore stated, the defense of laches was abandoned, and we are of the opinion it is not necessary to make a conclusion thereon. It may be that counsel will feel that a stipulation and order striking that defense from the answer should be filed to clarify the record.

The Court has added as a conclusion rather than a finding a statement that Phoebe M. Moss is the owner of said Letters Patent.

Plaintiffs' conclusion VIII has been worded to conform to the Court's finding on the subject of infringement.

We believe defendants' conclusion proposed in lieu of Plaintiffs' conclusion XI is in better form, and we have used it in our conclusion IX.

We have also added a conclusion regarding non-infringement of claim 7.

In Plaintiffs' conclusion XII, the proposed wording directs the special master to take an accounting, among other matters, of "reasonable royalty." The language of Section 70 of Title 35 U.S.C.A. is to the effect that general damages are to be awarded, not less than a reasonable royalty. Further, it is the Court's view that it is proper for the special master to take accounting for damages,

while costs and interest are to be fixed by the Court. Accordingly, the Court has added conclusion X, which also provides that Phoebe E. Moss is entitled to damages. [115]

We have made no findings or conclusions concerning wilful infringement or attorneys fees, but prefer to decide those issues after the report of the special master is presented. If either counsel believes this procedure to be erroneous, we should appreciate hearing from him so that we can consider whether an amendment to our findings and conclusions should be made prior to such report.

[Endorsed]: Filed September 18, 1950. [116]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action regularly came on for trial before the Court, Honorable Jacob Weinberger, judge presiding, plaintiffs in said action appearing by their counsel, Westall and Westall, by Joseph F. Westall, Esq., and Edward F. Westall, Esq., and defendants appearing by their counsel, Lyon and Lyon, by Reginald E. Caughey, Esq., and witnesses having been called and heard, counsel having been heard, and written argument and briefs having been filed after trial, and the Court, having rendered its written opinion, now makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

I.

The cause of action set forth in the [117] complaint herein arises under the patent laws of the United States.

II.

Perry M. Moss and Phoebe E. Moss are, and each of them have been, at all times mentioned in the pleadings herein, citizens of the United States.

Defendant Patterson-Ballagh Corporation was, at all times material herein until its dissolution, a corporation of the State of California, having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California; defendant Byron Jackson Company was, at all times material herein, a corporation of the State of Delaware, doing business in the City of Los Angeles, County of Los Angeles and State of California.

III.

Subsequent to the filing of this action defendant Byron Jackson Company acquired all of the assets of defendant Patterson-Ballagh Corporation and assumed any liability of Patterson-Ballagh Corporation in this action, and said latter corporation was dissolved and said Byron Jackson Company added as a defendant herein.

IV.

That on February 20, 1940, there was granted to Perry M. Moss, the original plaintiff in this action,

Letters Patent No. 2,190,880, for Draw Works Line Controllers. That subsequent to the filing of this action and on February 4, 1948, Perry M. Moss assigned to Phoebe E. Moss, his wife, his right, title and interest in and to said Letters Patent; that said assignment was duly recorded in the United States Patent Office, that said assignment included the right to recover for past infringement of said Letters Patent.

V.

That the application for said Letters Patent No. [118] 2,190,880 contains a written description of said Draw Works Line Controllers and of the manner and process of making, constructing and using same, in full, clear, concise and exact terms sufficient to enable any person schooled in the art or science to which said device appertains, to make, construct and use the same; that in said application said Perry M. Moss distinctly pointed out the subject matter of claims 2 and 7 of said Letters Patent as his invention and discovery.

VI.

That John E. Reed was not an inventor of the subject matter covered by claims 2 and 7 of the said Letters Patent No. 2,190,880.

VII.

That Perry M. Moss was the sole inventor of the subject matter covered by claims 2 and 7 of said Letters Patent No. 2,190,880.

VIII.

That the device or devices alleged by defendants to have been used, manufactured or sold by others prior to the date of invention by Perry M. Moss of the subject matter of claims 2 and 7 of said Letters Patent did not include the subject matter of said claims.

IX.

Since the grant and issuance of said Letters Patent No. 2,190,880, and within six years prior to the institution of this action and subsequent thereto, defendant Patterson-Ballagh Corporation until its dissolution, and thereafter, defendant Byron Jackson Co., have, without the consent of the plaintiffs or either of them, manufactured and sold devices known as wire-line guides or spoolers of the type pictured in Plaintiff's exhibit 10 E, page 1948 thereof, described in said Exhibit as the Patterson-Ballagh [119] "4-section guide," "6-section guide" and "2-section guide"; that each of said devices contained all of the structural elements of claim 2 of said Letters Patent; that said wire-line guides or spoolers were sold by defendants with the knowledge and intent that the users thereof would hang said devices so as to perform the functions specified in claim 2 of said Letters Patent.

X.

None of the devices of defendants mentioned in the preceding paragraph embody the subject matter of claim 7 of said Letters Patent.

XI.

The plaintiffs have placed upon each and all of the Draw Works Line Controllers manufactured and sold by said plaintiffs under said Letters Patent, the mark, "Patent No. 2,190,880."

XII.

On April 17, 1940, and on May 10, 1940, defendant Patterson-Ballagh Corporation was notified in writing by Perry M. Moss of the latter's claim that said corporation had infringed and was then infringing, Letters Patent No. 2,190,880.

XIII.

This Court reserves its finding on the questions of wilful infringement and attorneys' fees until after the filing of the report of the Special Master.

Conclusions of Law

From the foregoing Findings of Fact, the Court concludes:

I.

That the Court has jurisdiction of the subject matter and the parties in this action. [120]

II.

The Letters Patent No. 2,190,880 granted February 20, 1940, for Draw Works Line Controllers to Perry M. Moss involved invention as to claims 2 and 7 thereof; said Perry M. Moss was the sole inventor of the subject matter of said claims.

III.

Letters Patent No. 2,190,880 were regularly issued and delivered to said patentee, Perry M. Moss.

IV.

Phoebe E. Moss is the sole owner of said Letters Patent.

V.

Claims 2 and 7 of said Letters Patent are good and valid in law.

VI.

Notices of the granting and issuance of said Letters Patent and of plaintiffs' claim of defendants' infringement of said Letters Patent were given to defendants in this action prior to its institution.

VII.

The defendants, subsequent to the issuance of the patent in suit and within six years prior to the institution of this action, and subsequent thereto, have infringed claim 2 of said Letters Patent by the manufacture and sale of devices known as wireline guides or spoolers, of the type pictured in Plaintiff's Exhibit 10 E, page 1948 thereof, described therein as the Patterson-Ballagh "4-section guide," "6-section guide" and "2-section guide."

VIII.

The defendants and each of them have not infringed claim 7 of said Letters Patent. [121]

IX.

Plaintiff Phoebe E. Moss is entitled to a judg-

ment holding claim 7 of said Letters Patent valid, and holding claim 2 of said Letters Patent valid and infringed and providing for the issuance of an injunction restraining defendants and each of them, their officers, agents, servants, employees and attorneys and those in active concert or participation with them from infringing claim 2 of said Letters Patent.

X.

Plaintiff Phoebe E. Moss is entitled to a judgment against defendants for damages for the infringement of said claim 2 of said Letters Patent and this cause should be referred to a Special Master to be appointed by this Court to take an accounting and report to this Court the amount of such damages under the provisions of Section 70 of Title 35 U.S.C.A.

XI.

The Court reserves its conclusion on the questions of wilful infringement and attorneys' fees until after the filing of the report of the Special Master.

Dated September 15, 1950.

/s/ JACOB WEINBERGER,
United States District Judge.

[Endorsed]: Filed September 18, 1950. [122]

In the United States District Court, Southern District of California, Central Division

No. 5572-W Civ.

PERRY M. MOSS and PHOEBE E. MOSS,

Plaintiffs,

vs.

PATTERSON-BALLAGH CORPORATION, a California Corporation, and BYRON JACKSON CO., a Delaware Corporation,

Defendants.

JUDGMENT

The above-entitled action regularly came on for trial before the Court, Honorable Jacob Weinberger, judge presiding, plaintiffs in said action appearing by their counsel, Westall and Westall, by Joseph F. Westall, Esq., and Edward F. Westall, Esq., and defendants appearing by their counsel, Lyon and Lyon, by Reginald E. Caughey, Esq., and witnesses having been called and heard, counsel having been heard, written argument and briefs having been filed after trial, the Court having rendered its written opinion, and findings of fact and conclusions of law having been signed and filed the Court hereby upon such findings and conclusions,

Orders, Adjudges and Decrees, as follows: [123]

That a perpetual injunction issue out of and under the seal of this Court enjoining and restrain-

ing defendants and each of them, their officers, agents, servants, employees and attorneys and those in active concert or participation with them from infringing claim 2 of Letters Patent No. 2,190,880.

That plaintiff Phoebe E. Moss have and recover from defendants or either of them plaintiffs' taxable costs, fees and expenses of this suit, including reporter's fees.

That this case be referred to Ernest R. Utley, Esq., whose address is Subway Terminal Building, Los Angeles, California, as Special Master with all usual powers to take and report to the Court an account of any and all damages which plaintiff has sustained by reason of the infringement by defendants of claim 2 of the Letters Patent in suit.

Dated this 15th day of September, 1950.

/s/ JACOB WEINBERGER,
United States District Judge.

Entered September 18, 1950.

[Endorsed]: Filed September 18, 1950. [124]

In the United States District Court, Southern District of California, Central Division

No. 5572-W Civ.

PERRY M. MOSS and PHOEBE E. MOSS,

Plaintiffs,

vs.

PATTERSON-BALLAGH CORPORATION, a California Corporation, and BYRON JACKSON CO., a Delaware Corporation,

Defendants.

AMENDED INTERLOCUTORY JUDGMENT

The above-entitled action regularly came on for trial before the Court, Honorable Jacob Weinberger, judge presiding, plaintiffs in said action appearing by their counsel, Westall and Westall, by Joseph F. Westall, Esq., and Edward F. Westall, Esq., and defendants appearing by their counsel, Lyon and Lyon, by Reginald E. Caughey, Esq., and witnesses having been called and heard, counsel having been heard, written argument and briefs having been filed after trial, the Court having rendered its written opinion, and findings of fact and conclusions of law having been signed and filed the Court hereby upon such findings and conclusions,

Orders, Adjudges and Decrees, as follows:

I.

That this Court has jurisdiction of the parties and of [131] the subject matter.

II.

That the plaintiff Phoebe E. Moss is the owner of all the right, title and interest in and to the patent in suit 2,190,880, together with all rights of action for past infringement, and said patent, as to claims 2 and 7 thereof, is good and valid in law.

III.

That the defendants, and each of them, without the consent of the plaintiffs, or either of them, and in infringement of claim 2 of patent 2,190,880, manufactured and sold wire line guides or spoolers of the type pictured in plaintiffs' exhibit 10E, page 1948 thereof, and described in said exhibit as the Patterson-Ballagh 4-section guide, 6-section guide and 2-section guide, and with the knowledge and intent that the purchasers and users of said wire line guides or spoolers would hang the same so as to perform the function specified in claim 2 of said patent 2,190,880.

IV.

That none of the wire line guides or spoolers of defendants specified in the preceding paragraph embodied the subject matter of claim 7 of patent 2,190,880 and the defendants, and each of them, have not infringed claim 7 of said patent.

V.

That a perpetual injunction issue out of and under the seal of this Court enjoining and restraining defendants, and each of them, their officers, agents, servants, employees and attorneys and those

in active concert or participation with them from infringing claim 2 of Letters Patent No. [132] 2,190,880.

VI.

That plaintiff Phoebe E. Moss have and recover from defendants, or either of them, damages for said infringement, and plaintiffs' taxable costs, fees and expenses of this suit, including reporter's fees. Costs taxed at $406.40.

VII.

That this case be referred to Ernest R. Utley, Esq., whose address is Subway Terminal Building, Los Angeles, California, as Special Master, with all usual powers to take and report to the Court an account of any and all damages which plaintiff has sustained by reason of the infringement by defendants of claim 2 of the Letters Patent in suit, the Court reserving the issues of wilful infringement and attorneys' fees.

Dated October 13, 1950.

/s/ JACOB WEINBERGER,
United States District Judge.

[Endorsed]: Filed October 14, 1950.

Entered October 16, 1950. [133]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Patterson-Ballagh Corporation, a California corporation, and Byron Jackson Co., a Delaware corporation, defendants above named, appeal to the Court of Appeals for the Ninth Circuit from so much of the Judgment entered in this action on October 16, 1950, as is ordered, adjudged and decreed in and by Paragraphs II, III, V, VI and VII and each thereof.

Dated this 14th day of November, 1950.

LYON & LYON,
LEONARD S. LYON, JR.,
/s/ LEONARD S. LYON, JR.,
Attorneys for Defendants.

[Endorsed]: Filed November 14, 1950. [134]

[Title of District Court and Cause.]

ORDER UNDER RULE 73(g)

Upon Good Cause Shown, it is hereby ordered that defendants in this cause shall have to and including January 26, 1951, in which to docket the record on appeal in the Court of Appeals for the Ninth Circuit.

/s/ JAMES M. CARTER,
Judge.

Dated December 21st, 1950.

[Endorsed]: Filed December 21, 1950. [135]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME TO DOCKET APPEAL

It Is Stipulated by and between the parties, through their respective counsel, that the appellants may have up to and including February 12, 1951, within which to docket the above-entitled appeal with the Clerk of the Court of Appeals for the Ninth Circuit.

Dated this 25th day of January, 1951.

WESTALL & WESTALL,

By /s/ JOSEPH F. WESTALL,
Attorneys for Plaintiffs-Appellees,

LYON & LYON,

/s/ R. E. CAUGHEY,
Attorneys for Defendants-Appellants.

It Is so Ordered this 25th day of January, 1951.

/s/ JACOB WEINBERGER,
Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 26, 1951. [140]

In the United States District Court for the Southern District of California, Central Division

No. 5572-W Civil

Honorable Jacob Weinberger, Judge Presiding.

PHOEBE E. MOSS and PERRY M. MOSS,

Plaintiffs,

vs.

PATTERSON-BALLAGH CORPORATION and BYRON JACKSON CO.,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tuesday, February 17, 1948

Appearances:

For the Plaintiffs:

JOSEPH F. WESTALL, and
EDWARD F. WESTALL,
702 Wm. Fox Building,
Los Angeles, California.

For the Defendants:

LYON & LYON, by
R. E. CAUGHEY,
811 West Seventh Street,
Los Angeles, California.

* * *

Mr. Joseph F. Westall: If the court please, we offer in evidence the file wrapper and its contents, that is, the application proceeding of the Moss patent in suit, as Plaintiffs' Exhibit No. 11.

The Court: It may be received.

The Clerk: Are you reserving the other numbers for the deposition exhibits?

Mr. Joseph F. Westall: Yes; for the deposition.

The Clerk: Plaintiffs' Exhibit 11.

Mr. Joseph F. Westall: Then, we also offer in evidence the file wrapper of the Reed patent No. 2,238,398, granted April 15, 1941, as Plaintiffs' Exhibit No. 12.

The Court: It may be received.

Mr. Joseph F. Westall: We also offer in evidence a [25*] certified copy of the corporation records, showing the dissolution of Patterson-Ballagh, as Plaintiffs' Exhibit 13.

* * *

The Court: It may be received.

Mr. Joseph F. Westall: We offer in evidence the assignment of the entire right, title and interest to the patent in suit No. 2,190,880, granted February 20, 1950, and the right to recover profits and damages for past infringement, the assignment being of Perry M. Moss to his wife, Mrs. Phoebe E. Moss, as Plaintiffs' Exhibit 14.

The Court: It may be received.

Mr. Joseph F. Westall: We also offer in evidence a second assignment by Perry M. Moss to Mrs.

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Moss, the plaintiff in this case, of said Letters Patent in suit, which is an assignment to Mrs. Moss, as her sole and separate property, not only of the patent in suit but the right to recover for past and future infringement thereof, as her sole and separate property, as Plaintiffs' Exhibit 15. [26]

The Court: It may be received.

Mr. Joseph F. Westall: I would like to call Mr. Andersen to take the stand.

A. M. ANDERSEN

a witness for the plaintiffs, being first duly sworn, testified as follows:

The Clerk: What is your name?

A. A. M. Andersen.

Direct Examination

By Mr. Joseph F. Westall:

Q. What is your occupation?

A. Well, I am at the present time with the T. & T. Oil Company, in charge of transportation and materials; their drilling contractor.

Q. I didn't hear that.

A. Their drilling contractor.

Q. Where do you reside?

A. Bakersfield, 1711 Second Street.

Q. You are of legal age, are you not?

A. Yes, sir.

Q. Please state what, if any, education, training and experience you have had in oil well drilling or oil well management and over what period?

(Testimony of A. M. Andersen.)

A. Well, since 1922. I started with the Holly Oil and Holly Development Companies in September, 1922, and have been [27] in that with the exception of about two years, which was 1944 and 1945, when I was temporarily out of it.

Q. And what was the nature of your experience during that time?

A. At the time I was with the Holly Oil and Development Companies, I had charge of production and later had charge of development work, which started in along in the early thirties.

Q. Were you ever connected in any manner with the Conrad Well No. 1 of the Holly Oil Company?

A. Yes, sir. It is a well that the Holly Oil Company drilled on a lease known as the Conrad lease.

Q. I hand you a binder, which I ask be marked for identification as Plaintiffs' Exhibit 16, of what are labeled "Drillers' Daily Reports of the Holly Oil Company," referring to Conrad No. 1, and ask you whether or not those are the original drillers' reports relating to the work on that well.

The Clerk: Plaintiffs' Exhibit 16 for identification.

* * *

A. Well, as far as I have gone through here, they are with the exception of one or two of these reports. I have initialed them, which was common practice when I had charge of operations. [28]

* * *

Q. I believe that you were stating that there

(Testimony of A. M. Andersen.)

was some exception, that you hadn't signed one or two of them, did you say?

A. I presume it was either an oversight or that I was not on the job. This happened occasionally. However, it was, obviously—the initialing of those reports would indicate we had examined the reports and, if they were not initialed, it did not mean that the performance wasn't proceeding as ordinary, where they were initialed.

Q. Will you answer?

The Court: He has identified the reports.

Mr. Joseph F. Westall: Yes.

Q. Now, please examine Plaintiffs' Exhibit 16 for identification, the drillers' reports, and state the period of time covered by said reports.

A. It started in May, May 3rd, and there may have been an occasional tour omitted in the early stages of the operation.

The Court: What year?

A. 1936. The work was completed—— [29]

The Court: You have answered the question.

Mr. Joseph F. Westall: Yes.

Q. I call your attention to a number of apparent signatures near the bottom of the drillers' reports of May 16, 1936, Plaintiffs' Exhibit 16 for identification, and ask if such apparent signatures are signatures and if you recognize them and, if so, of whom are they signatures?

A. We have the signature of Perry Moss, driller; R. W. Moody, cat head; B. L. Thornton,

(Testimony of A. M. Andersen.)

derrick man; D. K. Clapp, pipe racker, and O. M. or O. W. Wilson.

It has been——

The Court: Will you keep your voice up? Everybody has to hear you.

A. Do you want the balance of those? There are some more names on here.

Q. (By Mr. Joseph F. Westall): I think that is enough. Please examine each of the daily drillers' reports. Exhibit 16 for identification, and state whether or not you do not find the signature of Perry M. Moss, the plaintiff in this case, on each of them.

The Court: Do you want to select those pages and show them to the witness?

Mr. Joseph F. Westall: The name is on every one of them, your Honor.

A. Yes; they appear on every one of them. [30]

Mr. Caughey: I would suggest, if you are familiar with those files, you point out those particular portions.

Mr. Joseph F. Westall: Yes. I was asking him if he finds the signature of Perry M. Moss.

A. I find "Perry Moss." He has signed them "Perry Moss." He didn't use his middle initial, "Perry M. Moss." I am sure that that is the name.

Q. You know that Perry M. Moss was working on that well from the start to the end of it, do you?

A. Yes, sir; he was a driller.

Q. Did Perry M. Moss, the plaintiff in this

(Testimony of A. M. Andersen.)

suit, ever disclose to you an invention of a draw works line controller?

A. At one time, in the process of drilling this well, he did discuss a line spooler. I can't tell you the date but I do know that it was during the period we were working this well.

Q. Please refer to the drillers' report of May 16, 1936, and see if there is anything that refreshes your recollection as to the date.

Mr. Caughey: I object to the question unless counsel lays the proper foundation as to place and time and parties present.

Mr. Joseph F. Westall: We will lay the foundation. I just asked him whether it disclosed it.

Mr. Caughey: I want him to lay the foundation so we [31] know where it took place, who was present and when it was, if he knows.

Mr. Joseph F. Westall: We intend to do that.

The Court: Are you just asking him to pull out that particular file or what are you inquiring about now?

Mr. Joseph F. Westall: I simply asked him to refer to the drillers' report of May 16, 1936, in order to see if that refreshes his recollection as to when this disclosure took place that I just referred to.

A. Well, it was probably——

The Court: Before you answer that question, have you examined that file there?

A. Yes, sir.

The Court: The objection is overruled.

(Testimony of A. M. Andersen.)

Q. (By Mr. Joseph F. Westall): Do you remember whether that was the date of the disclosure?

A. I can't say definitely that it was. However, I know that it was in the early stages of the drilling of this well that Perry Moss mentioned to me this line spooler.

Q. Where did this conversation, at which Mr. Moss disclosed the invention, take place?

A. On the floor of the oil derrick.

Q. And who was present, if anyone?

A. As I recall, it was shift-changing time and the driller that was relieving Perry Moss was on the floor and [32] probably all of his roughnecks. However, I can't say that any of them heard the conversation.

Q. Nor took part in it?

A. I can't say as to that; no, sir.

Q. Will you please describe generally what Perry M. Moss disclosed to you at the time you endeavored to fix?

A. His idea at the time was to take a piece of pipe and split it and insert his rubber blocks, as they are termed, or bearings, and run that over the line, instead of the crude way we were doing it at that time, with a piece of rotary chain, which was far from safe and very impractical and hard on the line. And I probably made the remark, like a lot of other fellows that tried to perfect something like that, that it probably was just another idea. But he did go into some detail. And shortly after,

(Testimony of A. M. Andersen.)

when he showed me his plans of what he had in mind, it did look very practical.

Q. Did he explain to you how the spooler was to be hung in the derrick?

A. Well, of course anything as heavy as that would have to be hung; otherwise, you would get no stabilization of it. It would be jumping all over the derrick, not so much probably coming out of the hole as going in the hole. But, when they are going in the hole with those rotary outfits, they run terribly fast and, if you didn't have some stability, you wouldn't have a line spooler. His ideas were explained [33] exactly as that model.

Mr. Joseph F. Westall: As the model shown of the derrick, of the small wooden derrick.

Q. Did he state about the hanging from the top?

A. Yes, sir.

Q. Did he explain why it was to be hung that way?

A. Well, in order to suspend it. In other words, the weights wouldn't suspend that line spooler and give it any stability at all. The general practice——

The Court: What is the date, did you say?

A. I cannot tell you the exact date. It was early in the process of drilling this well.

The Court: What year?

A. 1936.

Q. (By Mr. Joseph F. Westall): I show you the Moss patent in suit, to be hereafter introduced, or a copy of the Moss patent in suit, which is already marked in the deposition of Mr. Moss as Exhibit 1, and which will be formally introduced

(Testimony of A. M. Andersen.)

when we read the deposition, and ask you to please compare the disclosure that Mr. Moss made to you with the drawing of that Letters Patent.

A. Well, it appears to me that it is exactly as he had explained it inasmuch as that he later built an ideal model compared to his patent, and probably the sketch he showed me gave birth to the present spooler or guide. [34]

* * *

Q. (By Mr. Joseph F. Westall): Do you remember whether he showed you a sketch then?

A. Not at the time we first discussed it. It was later.

The Court: Does that straighten out your objection?

Mr. Caughey: Yes, your Honor.

Q. (By Mr. Joseph F. Westall): After this disclosure of the subject matter of said Moss patent in suit, as testified by you, some time early in May, 1936, do you know whether Perry M. Moss made or caused to be made a draw works line controller like or similar to that disclosed in his patent? I mean a full-sized device. [35]

A. Yes, sir; I know that positively.

Q. Do you know when he began to make that device or when he made that device?

A. As to date I could not say.

The Court: What do you call that? What is the name you gave to it?

Mr. Joseph F. Westall: A full-sized device.

The Court: Device of what?

(Testimony of A. M. Andersen.)

Mr. Joseph F. Westall: Of the patent in suit.

Mr. Caughey: May your Honor please, I think your Honor's question was prompted by the fact that Mr. Westall referred to the device somewhat differently than he referred to it before. I wonder if we could agree to refer to it as a certain specific thing, either as a wire line spooler or wire line guide?

The Court: If you will give it a name, then I can follow it better.

Mr. Joseph F. Westall: We can call it a spooler.

Mr. Caughey: All right; call it a spooler.

The Court: Will you show me what that is?

Mr. Joseph F. Westall: This is the spooler.

The Court: That is, that entire unit?

Mr. Joseph F. Westall: Yes; as shown in the derrick.

Q. Now, did you ever discuss with Mr. Moss the desirability of testing his theory to see whether it would work? [36]

A. Subsequent to the drilling of this Conrad well, the company purchased one of them and it was probably the first one that was put in operation. And I can't tell you exactly what the date was but I am sure that there are records that will show the exact date of the purchase of that line spooler.

Q. Yes; I was going to reach that. I believe you said you were connected with the Holly Oil Company as superintendent?

A. Yes, sir; in charge of operations and production.

(Testimony of A. M. Andersen.)

Q. Did the Holly Oil Company or you as superintendent use any spooler on the Conrad Well No. 1 during the period covered by the drillers' reports in evidence as Plaintiffs' Exhibit 16?

A. We used the rotary chain, which was common practice at that time.

Q. What kind of a device was that?

A. It was simply a rotary chain which has rollers in between the—in the links themselves, and you run your line through the link, which gives you a bearing effect on two sides. However, the rollers are very small and never were practical and are made of steel because of the excessive wear to the line as it traveled through it. However, it did offer some stability and was commonly used.

Q. That was in the absence of any other spooler, is that true? [37]

A. Yes, sir. I never saw a spooler outside of the chain spooler until we purchased from Perry Moss the spooler you have here.

Q. Did Perry M. Moss ever sell any spooler as described in his patent in suit to you?

A. He did.

Q. To whom did he sell that spooler?

A. To the Holly Oil Company at the beginning or shortly after the beginning of the drilling of No. 7-A well.

Q. And that was where?

A. On the Holly Oil property proper.

Q. At Huntington Beach? A. Yes, sir.

(Testimony of A. M. Andersen.)

The Court: Did you have the time fixed for that? Will you fix the time for that?

Mr. Joseph F. Westall: Yes; I will.

A. I think it can be established.

Mr. Joseph F. Westall: I have got the document showing the time of purchase.

Q. Will you please examine the document which I now show you, which I ask be marked for identification as Plaintiffs' Exhibit 17 for identification, and see if you can identify it?

The Court: It may be marked for identification.

Mr. Joseph F. Westall: I will ask that it be marked [38] for identification as Plaintiffs' Exhibit 17.

The Clerk: Plaintiffs' Exhibit 17 for identification.

Q. (By Mr. Joseph F. Westall): Purporting to be an order number of the Holly Oil Company to P. M. Moss for a line spooler?

A. Yes, sir. Those are positively my initials, and C. A. Johnson's, the president and general manager of that company, who generally had the invoices passed over his desk and initialed them also, and that is the original.

Q. Does the date on this order number, May 4, 1937, refresh your recollection as to when the order was made out?

A. Well, it is the date that we bought the spooler, obviously. I suppose Holly would have some records to substantiate it together with this, in the way of

(Testimony of A. M. Andersen.)

drawing vouchers and so forth. I don't know if they would be available or not. [39]

* * *

Q. (By Mr. Joseph F. Westall): After that line spooler was purchased, after you got possession of it, did you put it to any use? Did you test it?

A. We did.

Q. And on what well did you test it?

A. On Holly Oil Well 7-A.

Q. At Huntington Beach, of the Holly Oil Company? A. Yes, sir.

Q. When was it tested?

A. Immediaely after purchasing and the drilling of that well.

Q. Could you give an approximation of when that was?

A. I can't tell you the date that the well was spudded but it was immediately after we spudded that well that we purchased the line spooler and put it into practice.

Q. Can you refresh your recollection by an examination of the drillers' reports of that well?

A. I presume I could.

Mr. Joseph F. Westall: We ask that the drillers' reports of the Holly Oil Company Well 7-A be marked for identification as Plaintiffs' Exhibit 18.

The Court: They may be so marked.

Q. (By Mr. Joseph F. Westall): I will ask you to state whether or not the binder which I hand you, marked "Drillers' Daily Reports, Holly Oil Com-

(Testimony of A. M. Andersen.)

pany, Well No. 7-A," [40] relates to the well which you have been discussing.

A. These are copies of the log of that well, the drillers' reports.

Mr. Joseph F. Westall: We now offer in evidence, as Plaintiffs' Exhibit 17, the order number of the Holly Oil Company, heretofore marked for identification, as Plaintiffs' Exhibit 17.

Mr. Caughey: May I ask the witness, before that is ruled on—I don't remember that he said specifically that that was their usual——

The Court: You may ask him.

Mr. Caughey: Do you recognize that as an order of the Holly Oil Company?

The Witness: That is not an order. That is a sales sheet from Moss. In other words, an invoice is what that is.

Mr. Caughey: Is this what the Holly Oil Company received from Moss?

The Witness: That is right.

Mr. Caughey: Is that your testimony?

The Witness: Yes, sir.

Mr. Caughey: And did you receive it?

The Witness: We certainly did.

Mr. Caughey: I didn't ask you whether "we did." I asked whether you did.

The Witness: I initialed it. [41]

Mr. Caughey: You initialed it when it was received?

The Witness: When it was received and went

(Testimony of A. M. Andersen.)

through the clerks' hands, they put that stamp on there, as you will note.

Mr. Caughey: And, when you say "they," you mean the clerks, is that right?

The Witness: That is right; in the process of going through the office, and I initialed it as having been received.

Mr. Caughey: Where, Mr. Anderson, has this been, to your knowledge, since then?

The Witness: I presume in the files of the company.

Mr. Caughey: You had nothing to do with producing it here?

The Witness: I did not, sir.

Mr. Caughey: And you have no specific recollection yourself at the present time of this particular order?

The Witness: It could be nothing but the original to my way of thinking.

Mr. Caughey: It could be?

The Witness: It couldn't be anything but the original.

Mr. Caughey: You have no specific recollection of it, though, as this particular order, do you?

The Witness: I do, sir, because, when those things came in, they didn't come in only through the regular process of business and that is the way it was handled and I initialed [42] it and it was sent into the Los Angeles office, and Mr. Johnson initialed it. And, if you go into the records, you will find a voucher was drawn for it.

(Testimony of A. M. Andersen.)

Mr. Caughey: My question was whether you at the present time have a distinct recollection of this particular order.

The Witness: It certainly would refresh my memory to the point of where it was in the regular process of business. As far as remembering the specific incident, no, but the proof is there, inasmuch as I initialed it and it was initialed at the time that the purchase was made.

Mr. Caughey: And that was May 4, 1937, the date shown on that?

The Witness: That is right.

Mr. Caughey: That is the date you initialed it?

The Witness: It probably isn't the date I initialed it. It may have been a day or two later, after it went through the channels in the office and was placed on my desk, but it was certainly in that immediate vicinity of time.

Mr. Caughey: But there isn't any question in your mind but what that is an order that was received by the Holly Oil Company?

The Witness: Definitely.

Mr. Caughey: And it covers the particular device which subsequently you hung in the well?

The Witness: Yes, sir. [43]

Mr. Caughey: There is no question about that?

The Witness: No, sir.

The Court: It may be received and marked in evidence as Plaintiff's Exhibit 17.

Mr. Joseph F. Westall: We offer in evidence,

(Testimony of A. M. Andersen.)

as Plaintiffs' Exhibit 18, the drillers' daily reports of Well No. 7-A of the Holly Oil Company.

Mr. Caughey: May your Honor please, my recollection is that the witness testified that this was a copy of the drillers' reports.

The Witness: That is a copy of the drillers' reports and log, whereas on the Conrad it is the original.

The Court: Where is the original?

The Witness: The original is probably in the Los Angeles office of the Holly Oil Company.

Q. (By Mr. Joseph F. Westall): This was a carbon that was made at the same time?

A. That is right. That is an exact duplicate of the original. It was the custom of the company to send the originals to the Los Angeles office and the copies were filed at Huntington Beach.

Mr. Caughey: I won't make any objection to that, your Honor.

The Court: It may be received as Plaintiffs' Exhibit 18.

The Clerk: Plaintiffs' Exhibit 18 in [44] evidence.

Mr. Joseph F. Westall: We also offer in evidence the drillers' daily reports of the Holly Oil Company of Conrad Well No. 1, heretofore marked for identification as Plaintiff's Exhibit 16.

Mr. Caughey: May your Honor please, I would like to ask why they are offering all of Exhibit 18, for example. I have no objection to it all going in but it seems to me that it was merely to refresh

(Testimony of A. M. Andersen.)

the witness' recollection as to when the well was spudded in and that we can agree as to that. I don't see any reason for encumbering the record with quite a bulky document here, the main portion of which, obviously has nothing to do with any of the issues.

Mr. Joseph F. Westall: It shows the length of time, the period of time.

Mr. Caughey: I will stipulate to that. There is no objection to that. I will stipulate that this was spudded in on 4-7-37 and that this particular drillers' daily report goes through to 1-9-38. I will stipulate to that as to this particular well.

The Court: Exhibit what?

Mr. Caughey: 18.

Mr. Joseph F. Westall: April 4, 1937, and it goes to January 9, 1938.

Mr. Caughey: That is correct.

The Court: That is, the well was spudded in on that first [45] date?

Mr. Joseph F. Westall: Yes.

The Court: What do you want to do about the exhibit now? Do you want to withdraw it?

Mr. Joseph F. Westall: With that stipulation, it will be satisfactory and we will withdraw the exhibit.

The Court: Exhibit 18 is withdrawn, is it?

Mr. Joseph F. Westall: Yes; Exhibit 18 for identification.

The Clerk: The offer is pending on Exhibit No. 16.

(Testimony of A. M. Andersen.)

Mr. Caughey: I am perfectly willing to stipulate as to Exhibit 16 that Conrad No. 1 was spudded in on May 3, 1936, and that the last page on this drillers' report in this particular document is August 29, 1936. I have no objection to putting in the particular page of May 16, 1936, which was specifically referred to by the witness, on which Mr. Moss' alleged disclosure was made. [46]

* * *

The Court: Will you do this? Will you mark that particular page?

Mr. Joseph F. Westall: Yes.

The Court: And then, after you are through with it——

Mr. Westall: Put that in evidence as a Plaintiffs' Exhibit by this number.

The Court: All right. Is there any objection to that procedure?

Mr. Caughey: No; none whatever, your Honor.

The Court: Just mark that particular page and this will remain for identification as Exhibit No. 16.

The Clerk: Shall I number the page "16-A"?

The Court: It may remain for identification and then Exhibit 16-A may be received in evidence. Is that satisfactory?

Mr. Joseph F. Westall: Just a minute. With that stipulation, we offer in evidence now the drillers' daily reports of the Holly Oil Company Conrad No. 1, dated May 16, 1936, as Plaintiffs' Exhibit 16-A.

(Testimony of A. M. Andersen.)

The Court: Exhibit 16-A in evidence?

Mr. Joseph F. Westall: Yes.

The Court: It may be received. And Exhibit 16, the [47] rest of the file, will remain for identification, is that correct?

Mr. Joseph F. Westall: Yes; that will remain for identification.

Q. Now, I don't know whether I asked you if they tested that spooler that the Holly Oil Company purchased, as shown by the order which you have identified. A. It was operated.

Q. Actually operated?

A. And it was, obviously, tested through the operation.

Q. Do you know whether or not it was successful? A. It was.

Q. And do you know whether it is still in use?

A. Not having been with the Holly Company for several years, I can't say whether it is still in use but I would venture to say it is there on the property somewhere.

Mr. Caughey: May I ask that the latter part of the answer be stricken, your Honor, as a conclusion?

The Court: The latter part may be stricken beginning with "venture to say."

Mr. Caughey: Yes; that is correct.

Mr. Joseph F. Westall: Yes; that is right. That isn't so good. That is all. [48]

* * *

(Testimony of A. M. Andersen.)

Cross-Examination

By Mr. Caughey:

Q. Mr. Andersen, your testimony was, as I remember it, that it was on or about May 16th that Mr. Moss made this disclosure to you?

A. Yes, sir; early in the drilling of that well.

Q. You understood when he made the disclosure that what he was trying to accomplish was to eliminate the whipping in the line, in the wire line, that went from the crown block to the drum, is that right?

A. Well, I would say that was one of the features.

Q. Wasn't that the principal feature?

A. You already had something that would take a certain amount of whip out of the line.

Q. But it didn't do a good job, did it?

A. It wasn't sufficient and it was hazardous and hard on the equipment. [50]

Q. And you understood what Mr. Moss was talking about was something that would do a better job than the previous equipment you had?

A. That is right.

Q. And that was to eliminate the whipping in the line, is that right?

A. Together with saving the equipment.

Q. Saving the equipment? A. Yes, sir.

Q. That previous equipment that you talked about you stated was just a chain that was fastened around the wire line?

(Testimony of A. M. Andersen.)

A. You simply bent a link and slipped the wire line in there and put it back together and had your weights on either end, which gave you some stability.

Q. Did you have a line running from that structure up to any place up on the derrick?

A. No, sir; not even as a safety measure.

Q. Not even as a safety line? A. No, sir.

Q. That is, they relied just on the weights on the side to hold it in place? A. That is right.

Q. There wasn't sufficient friction between that structure and the line to cause that structure to ride up on [51] the wire rope, was there?

A. It was very negligible.

Q. As a matter of fact, if you had had very much friction, you would have had a lot of sparks, wouldn't you?

A. I think sometimes we did have sparks.

Q. And that is one thing you wanted to eliminate? A. Yes.

Q. Did you understand that this construction that Mr. Moss disclosed to you would have a closer fit along the wire line than the previous construction?

A. Well, I can't say as to the fit but it was longer, which would obviously give you stability.

Q. Did he tell you how long it was going to be?

A. As I recall, he gave me a very good mental picture and the picture was very much in line with what he later did.

Q. How long was it? How long did he say it

(Testimony of A. M. Andersen.)

should be when he disclosed this to you on or about May 16, 1936?

A. I presume it was in the neighborhood of 30 inches but I couldn't say as to that. It was somewhere in that neighborhood.

Q. Did he tell you it would have rubber bearings inside? A. Yes, sir.

The Court: Just what is it you are discussing when you say "it"? [52]

Mr. Caughey: I am discussing what we have agreed upon as the spooler.

Q. This spooler that Mr. Moss disclosed to you you stated was to have rubber bearings in it? That is what he disclosed to you? A. Yes, sir.

Q. And it was to have a side bridle such as shown in this spooler that is in this little model?

A. Yes, sir.

Q. It was to have either a wire or some means running from a pulley and weights on each side, is that correct? A. That is right.

Q. Did he describe to you whether this was to be hinged or was it to be two pieces latched together or hinged or what?

A. I can't say in that minor detail. I do not remember.

Q. But you do recall that he specified that the line should be hung from the top?

A. Because of the size of it and the weight of it, it would have to be suspended.

Q. You knew that, didn't you, too?

A. It was obvious, if he was going to build any-

(Testimony of A. M. Andersen.)

thing as massive as it was, he would have to suspend it because he couldn't put weights on the outside. I don't believe it would have kept it in suspension. [53]

Q. In other words, the weights on the outside were such that it would sag in the middle?

A. That would be the actual experience if you were to have the real model.

Q. After he made this disclosure to you, as you said, you believe on or about May 16th, although you can't fix any definite time, as I understand your testimony, it wasn't until some time in May, 1937, that the Holly Oil Company actually bought one of these spoolers? A. That is right.

Q. In the meantime, did you see any other spoolers? A. I did not.

Q. As far as you knew, that was the first spooler that was ever manfactured and sold, when the Holly Oil Company bought it?

A. I would say that it was the only thing that I had ever seen that looked practical.

Q. I mean you didn't see any other like or hear of any other like Mr. Moss'? A. No, sir.

Q. Subsequent to purchasing this spooler on May 4th, do you recall any other spoolers purchased from Mr. Moss by the Holly Oil Company?

A. No, sir.

Q. As far as you know, that was the only [54] one?

A. That is the only one the Holly Oil Company purchased that I know of.

(Testimony of A. M. Andersen.)

Q. And that was used at Huntington Beach?

A. Yes, sir; on Well No. 7-A.

Q. After it was used on the well which was spudded in in January, not the Conrad but the other one—what was the name of it?

A. The 7-A. I think it was early in May when it was spudded.

Q. Do you recall the next well that that particular spooler was used on, that you purchased from Mr. Moss?

A. It is possible that it was used on wells where we did remedial work. However, no subsequent wells were drilled on the lease.

Q. So any time it would be used would be on some job where you were not drilling?

A. Doing remedial work.

Q. And you can't recall any specific well that was done on?

A. Offhand, I couldn't tell you which was the first one in line. I am sure it was run on subsequent wells.

Q. Do you know what time? A. No.

Q. You have had a lot of practical experience in oil fields, have you not, Mr. Andersen? [55]

A. I have.

Q. Both in drilling and producing?

A. Yes, sir.

Q. I believe you stated you were superintendent of Holly at that time?

A. I was superintendent for the Holly Oil Company and the Holly Development Company.

(Testimony of A. M. Andersen.)

Q. As superintendent, what did your duties include, briefly?

A. Supervising the production and development work.

Q. And, when you say "development," you include drilling? A. That is right.

Q. And Mr. Moss was working on the rig under you?

A. He was working on this Conrad well under me. I don't think Mr. Moss was immediately employed on 7-A.

Q. Just on Conrad?

A. Well, he may have done some work on 7-A. I couldn't say without going through the log.

Q. And was he a driller?

A. He was a driller.

Q. I believe you testified, did you not, that, when the line went into the well, it went in a lot faster than it came out? A. Yes, sir. [56]

Q. That is obvious almost, isn't it, and there would be no trouble then of the friction on the line carrying the line spooler up when the line went in?

A. Well, we never had any trouble.

Q. In other words, you stated that there was sufficient clearance in the spooler that Mr. Moss sold Holly between the inside periphery in the hole and the line so that you didn't have any particular trouble with the friction carrying it up on the line, is that right?

A. Well, obviously, from a practical standpoint, you wouldn't have that so that it would fit tight

(Testimony of A. M. Andersen.)

enough to create a friction. It would be against better judgment to even install it that way.

Q. May I ask you do you have any recollection as to how much clearance there was between the line and the inside periphery?

A. I would say this, that, from a practical standpoint, you wouldn't have less than an inch and an eighth hole if you ran the inch line through it, which was common practice in those days, with a one-inch casing.

Q. In other words, you would have about an eighth clearance all around, no less than that?

A. I didn't say all around. I said you wouldn't have less than an inch and an eighth hole if you were going to run an inch line through it. [57]

Q. Do you actually recall how much clearance there was on this spooler of Mr. Moss?

A. I do not.

Q. Do you have any recollection whether you had any difficulty with the friction causing the spooler to go up on the wire rope?

A. Frankly, I doubt if there were any changes, major changes, made in Perry's original model to the present day model.

Q. I am not asking you that. I am asking you the question as to whether you recall whether or not that particular spooler did ride up on the line as you went in the hole.

Mr. Joseph F. Westall: That is objected to as several times answered.

Mr. Caughey: No; it hasn't been answered.

(Testimony of A. M. Andersen.)

The Court: He may answer.

A. I would say no; it wouldn't have a tendency to ride up.

Q. (By Mr. Caughey): In other words, you don't recall it ever riding, that that particular one ever did ride, up on the line?

A. No, sir.

Q. Did you have, in addition to the hanging line that is shown at the top, from an eye at the top, another line similar to this line that is shown at the end on here? [58]

A. A short line, as more or less of a safety measure; not from the standpoint of holding it down.

Q. Wouldn't this function as a safety measure, this upper line? A. Partially.

Q. What do you mean by "partially"?

A. If you broke your drilling line, you may break that line also and you would have a double safety factor.

Q. So, then, they are both safety lines? They both function as safety lines?

A. No; I wouldn't say that they act as safety lines exactly. The top one would certainly be considered a suspending line.

Q. Isn't it also a safety line?

A. You could include that also.

Q. It functions also as a safety line, does it not?

A. I think the prime reason was suspension.

Q. I am not asking you whether the prime rea-

(Testimony of A. M. Andersen.)

son was suspension. I am asking you if it did not also function as a safety line.

A. I think it could be interpreted as such.

Q. And the lower line functioned as a safety line? A. That is right.

Q. So you would have two safety lines, so, if this upper one would break in addition to the side bridle, you [59] would still have another safety line down below?

A. I don't think there would be any danger from that point but there would be danger in case you broke the drilling line.

Q. If the drilling line broke——

A. As far as those side lines breaking, that happened quite often.

Q. If the drilling line broke, what effect would that have, Mr. Andersen, in so far as the spooler was concerned?

A. It would certainly throw it out in the open and you don't know what the effect of the breaking of that line may have had on it.

Q. If the line broke and the line parted and came out of the spooler, the spooler would still be held up by the weights suspended on either side, would it not, if those side lines didn't break?

A. It woudn't be in a proper position.

Q. That may be so but it would still hold it up?

A. Perhaps.

Q. What do you mean by "perhaps"?

A. It would just depend on how heavy your weights were.

Q. If your weights were——

A. If your weights were heavy enough, you could certainly suspend it. The laws of gravity would take care of that. [60]

Q. Even if the line broke and one of these bridle lines would break and the upper suspension line would still hold, then the spooler would still hang, would it not? A. Yes, sir.

Q. During your testimony you made some statement about some sketches or plans that were shown to you by Mr. Moss. Do you recall that testimony?

A. Yes, sir.

Q. When were they shown to you?

A. Subsequent to the time that he discussed it with me.

Q. How long subsequent to it?

A. I cannot say.

Mr. Caughey: That is all.

Mr. Joseph F. Westall: Mr. Disher.

R. D. DISHER

a witness for the plaintiffs, being first duly sworn, testified as follows:

The Clerk: What is your name, please?

A. R. D. Disher.

Direct Examination

By Mr. Joseph F. Westall:

Q. Where do you reside? A. Long Beach.

Q. And what is the address? [61]

A. 2725 Baltic Avenue.

(Testimony of R. D. Disher.)

Q. And what is your occupation?

A. I am an oil well drilling contractor.

Q. You are of legal age, are you not?

A. Yes, sir.

Q. Do you know of the Severns Drilling Company? A. Yes, sir.

Q. What, if any, connection or employment have you had with the Severns Drilling Company?

A. Oh, I was a tool pusher for them a while and drilling superintendent and now I am a partner with Mr. Severns in the drilling business.

Q. How long have you had training or experience in drilling oil wells? A. 26 years.

Q. Will you please state the nature and kind of your experience during those 26 years, generally?

A. I worked as a rotary helper and derrickman and driller and tool pusher and superintendent.

Q. Are you familiar with the use and operation of line spoolers? A. Yes, sir.

Q. How long have you had such last-mentioned experience?

A. Do you mean with line spoolers? [62]

Q. With line spoolers.

A. Oh, I would say 10 or 12 years as nearly as I can remember.

Q. I show you what purports to be an order, heretofore in evidence as Plaintiffs' Exhibit 17, dated May 4, 1937, of the Holly Oil Company, apparently, it seems, directed to Perry M. Moss, and to ship to Huntington Beach, for use on Well

(Testimony of R. D. Disher.)

7-A, one line spooler, and ask you if you can identify this document and, if so, please do so.

A. That is what I would interpret it as.

Mr. Caughey: That is objected to as not responsive and a motion is made to strike the answer. He asked him if he could identify it. He said he interpreted it as such.

The Court: That is not an answer to the question. That objection is sustained.

Q. (By Mr. Joseph F. Westall): Will you state what that document is?

A. It is an order authorizing the payment of $75 for one line spooler. If I got a bill like that, I would expect to pay it.

Q. Are you familiar with the line spooler put out by Patterson-Ballagh prior to the grant of the Moss patent, which was granted February 20, 1940?

A. Yes, sir.

Q. Have you examined the drawings of Reed patent No. [63] 2,238,398, for a line spooler, granted April 15, 1941, which is in evidence in the Moss deposition as Exhibit 2? A. Have I read it?

Q. And examined it?

A. No; I haven't.

Q. Will you please now briefly examine the drawings? Do you understand generally what is shown in the drawings? A. Yes, sir.

Q. You have referred to a Patterson-Ballagh spooler. Is that what you meant by the Patterson-Ballagh spooler? A. No, sir.

(Testimony of R. D. Disher.)

Q. The Patterson-Ballagh spooler of the Reed patent?

A. This one? It looks like the Patterson-Ballagh to me. It has the wire cables on the side, bolted together.

Q. Do you know whether or not there was any successful line spooler prior to the grant of the Moss patent in suit?

A. We had one made out of a piece of chain. It would spool the line but you couldn't keep the steel wickers out of your eyes.

Q. It threw sparks and threw off chips?

A. Yes, sir.

Q. That is the one described by Mr. Andersen in his testimony, is it?

A. It was metal against metal.

Q. And that was not very successful, was it? [64]

A. No, sir.

Q. You have referred to a line spooler which was ordered, as shown by Plaintiffs' Exhibit 16——

A. The order slip——

Mr. Caughey: Just a second. May your Honor please, I don't recall any testimony where this witness referred to any such spooler. You showed him the order slip and he said that is an order slip, and I could have read the same thing the witness did from the slip but I don't recall him testifying anything about it outside of just referring to the slip.

Mr. Joseph F. Westall: I will withdraw the question and ask this.

(Testimony of R. D. Disher.)

Q. Still referring to that order slip, do you know whether or not the Holly Oil Company received the device of the Moss patent as described in said order slip?

A. They received a Moss line spooler. I worked for the Holly Oil Company a few days then and the line spooler was on the well I was on, yes, sir.

Q. And was it used successfully?

A. Yes, sir.

Q. Do you know how long it was continued in use?

A. No. I left there and went on another job.

Q. Do you know whatever became of that line spooler after that? A. No; I don't. [65]

* * *

J. C. BALLAGH

a witness for the plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

A. J. C. Ballagh.

Direct Examination

By Mr. Joseph F. Westall:

Q. Where do you reside?

A. 180 South Highland Avenue, Los Angeles.

Q. And what is your occupation?

A. I am in charge of the Patterson-Ballagh Division of the Byron Jackson Company.

Q. And you are an officer of the Byron Jackson Company, are you not? A. Yes, sir.

(Testimony of J. C. Ballagh.)

Q. What is your official capacity?

A. Vice president.

Q. Where is your office located?

A. 1900 East Sixty-fifth Street.

Q. Los Angeles? A. In Los Angeles.

Q. And you were connected in an official capacity in [66] the Patterson-Ballagh Corporation before its dissolution, were you not? A. Yes, sir.

Q. What was your connection with said Patterson-Ballagh Corporation before it was dissolved?

A. I was the president.

Q. You were the president? A. Yes, sir.

Q. And you were also a director?

A. Yes, sir.

Q. And did you have any other capacity in that corporation? A. General manager.

Q. How long were you connected in any capacity with the Patterson-Ballagh Corporation before its dissolution? A. Approximately 19 years.

Q. And during that time in what capacities and when?

A. Well, I founded the company and have been its managing director ever since.

Q. And then did you continue to be an officer of the company? Were you incorporated at that time?

A. Do you mean when we started in business?

Q. Yes.

A. No; we started as a partnership for a few months and then we incorporated. [67]

(Testimony of J. C. Ballagh.)

Q. Who was your partner?

A. C. L. Patterson.

Q. How long did you continue that partnership?

Mr. Caughey: Now, may your Honor please, I don't see the purpose of this. I have no objection, if there is some pertinency, to going back 19 years in this matter.

The Court: What is your representation in that respect?

Mr. Joseph F. Westall: I simply want to show his long connection with Patterson-Ballagh Corporation and its activities from the beginning.

The Court: You may proceed.

Q. (By Mr. Joseph F. Westall): You are the James C. Ballagh who, on September 18, 1947, gave your deposition in this case, are you not, which is on file? A. Yes, sir.

Q. At the bottom of page 16 of said deposition——

The Court: Do I understand the entire deposition is now in evidence?

Mr. Caughey: No; it isn't.

The Court: The file is here showing that deposition.

Mr. Caughey: It may have been filed but it has to be offered.

Mr. Joseph F. Westall: It isn't admissible in evidence if the witness can be called and we have called the witness.

(Testimony of J. C. Ballagh.)

The Court: I just wanted to know what the situation is.

Mr. Caughey: I am glad your Honor raised it because I [68] was just going to inquire whether they were going to use the deposition and what for. If they want to ask the witness questions, I have no objection, but I don't see how he can very well refer to the deposition without it being in evidence, and he may use it then for the purpose of showing he is not testifying the same as he did. I don't see what use he can make of this in evidence. The witness is here.

* * *

Q. (By Mr. Joseph F. Westall): Will you please now examine—Mr. Clark, have you got Moss deposition exhibits 10-A——

The Clerk: I think this is intended to be marked 10-e instead of E.

Mr. Caughey: I will so stipulate. [69]

Mr. Joseph F. Westall: Yes; I think we will both stipulate that is the exhibit.

Q. Will you please now examine——

The Court: What did you hand the witness?

Mr. Joseph F. Westall: Moss deposition exhibits 10a to 10n.

The Court: Inclusive?

Mr. Joseph F. Westall: Inclusive—and state whether or not you find that they are advertisements of the Patterson-Ballagh Corporation?

Mr. Caughey: I will so stipulate.

(Testimony of J. C. Ballagh.)

Mr. Joseph F. Westall: You will stipulate that they are advertisements?

Mr. Caughey: That is correct. It was so stipulated in the deposition. In order that I may be sure that they are the ones that I previously saw, if you will permit me to look at them, I can tell.

The Court: With reference to these exhibits, if you are not going to offer the deposition, should they not be identified as exhibits in the case rather than exhibits attached to the deposition?

Mr. Joseph F. Westall: We are going to offer the Moss deposition, not the Ballagh deposition, and these are identified in the Moss deposition.

Q. Still referring to the same exhibits, will you [70] please state, at the time of the dates of these various advertisements and literature if the Patterson-Ballagh Corporation or its successor Byron Jackson Company—I don't know what the latest date is.

Mr. Caughey: 1947.

Mr. Joseph F. Westall: Yes—manufactured, sold and offered for sale the devices shown in those advertisements?

A. If these are the same that were in this deposition, the answer would be yes.

Q. Yes; those are the same ones you have just examined. And you manufactured and made an offer for sale and sold these devices as shown in these various pieces of literature?

Mr. Caughey: With the understanding, Mr. Westall, as you know, that some of those cuts show

them installed in wells and Patterson-Ballagh Corporation, as you know, sold them but they were not installed when they manufactured and sold them.

Mr. Joseph F. Westall: Many of them illustrate how they are to be attached in the well.

Mr. Caughey: That may be so but your question was "manufactured and sold."

Mr. Westall: It didn't include the derrick. It included the spooler.

Mr. Caughey: That is correct. [71]

The Court: Have those been marked as exhibits?

Mr. Joseph F. Westall: In the Moss deposition. They are marked and are in evidence and, when we read the Moss deposition, they will then be offered as part of that deposition. I am just identifying them for the present and having him testify to these, which he did do in his own deposition, which he now does repeat, so that we have in evidence that they manufactured and sold those things as shown.

Q. In many of those advertisements you will see a line attached to the top of the spooler, such, for instance, as Exhibit 10-B, is there not?

A. Yes, sir.

Q. You have since the grant of the Moss patent February 20, 1940,—Patterson-Ballagh Corporation before its dissolution and since then the Byron Jackson Company have attached the line, the hanging line, to the top of the spooler, have they not?

A. Yes, sir.

Mr. Caughey: Now,——

Mr. Joseph F. Westall: He says, "Yes, sir."

(Testimony of J. C. Ballagh.)

The Court: I didn't hear the answer. You said what?

Mr. Joseph F. Westall: That they attached a line to the top of the spooler.

A. That Patterson-Ballagh did.

Mr. Joseph F. Westall: That Patterson-Ballagh [72] Corporation, before its dissolution and after the grant of this patent, in February, 1940, attached the line and since that time Byron Jackson, since the dissolution, has attached the line to the top of the cylinder.

Q. Have they not?

A. I will say yes; at the top and in the center.

The Court: I didn't hear that answer.

A. At the top and in the center.

The Court: What patent are you showing to the witness?

Mr. Joseph F. Westall: I am showing him the Moss patent, at the top.

The Court: Now?

Mr. Joseph F. Westall: Yes.

The Court: You are asking him what?

Mr. Joseph F. Westall: I am asking him if they attached it at the top as shown in the Moss patent.

A. I don't know as in the Moss patent.

Q. Well, in the hanger at the top of the spooler, as very clearly shown in the Moss patent. The hanging line is shown?

A. We hang close to the top. I won't say we hang just the same as the Moss patent but we hang close to the top.

(Testimony of J. C. Ballagh.)

Q. Instead of, as previous to the Moss patent, in the middle? [73]

A. Well, we didn't hang it in the middle previously all the time.

The Court: Pardon me, Mr. Westall. If you will step around here and inquire, we can all hear those answers better. Did everybody get the answer?

Mr. Caughey: I think I did but there is difficulty.

The Court: What is the answer?

A. The answer was we did hang them from the top prior to that time.

Q. (By Mr. Joseph F. Westall): You had a license under the Reed patent, did you not?

A. Yes, sir.

Q. I show you the Reed patent No. 2,238,398, granted April 15, 1941, Moss deposition Exhibit 2, and I point out particularly the hanging by the line 29 in the middle of the spooler at 23. As licensees under said Reed patent, you hung as shown in the Reed patent, didn't you, before the grant of the Moss patent?

Mr. Caughey: May your Honor please, the Reed patent is governed by what the claims of the patent cover. If you will refer to any of the claims——

Mr. Joseph F. Westall: The Reed patent.

Mr. Caughey: The Reed patent is governed by what the claims say.

Mr. Joseph F. Westall: The Reed patent discloses [74] certain things and shows the drawings

(Testimony of J. C. Ballagh.)

and I am simply asking him whether they hung as shown in the Reed patent.

Mr. Caughey: You are asking him as licensee whether it didn't do that. If you want to show what the patent disclosed and ask him whether it shows that hanging line in the middle, that is something else but to tie it in with them as licensee is something else, also.

Mr. Joseph F. Westall: I am simply asking whether or not, as licensee or otherwise, they used that disclosure of hanging in the center which I have pointed out.

The Court: Do you mean in the manufacture of the spooler?

Mr. Joseph F. Westall: In the manufacture.

Q. Did you do that?

A. Yes; in the manufacture; the initial guides.

Q. And you sold them as so manufactured with those hanging lines? A. Yes.

The Court: That is in the middle there?

Mr. Joseph F. Westall: In the middle.

Q. That line that I last spoke of, line 29, is a hanging line, isn't it?

The Court: To which patent are you referring?

Mr. Joseph F. Westall: I am talking about the Reed patent. [75]

Q. That is a hanging line, isn't it?

A. It is either a hanging line or a safety line. I don't know what the number shows in the specification. It is called a supporting cable.

Q. A supporting cable? A. Yes, sir.

(Testimony of J. C. Ballagh.)

Q. And you called it in your advertisements a hanging line, did you not? A. Yes, sir.

Q. In many of them? A. Yes, sir.

Q. Do you find any safety line disclosed in said Reed patent, Moss deposition Exhibit 2?

A. 29 would be a safety line.

Q. You don't see any other safety line?

The Court: Are you still looking at the Reed patent?

Mr. Joseph F. Westall: Yes; still looking at the Reed patent.

A. No; I don't see another one.

The Court: So I won't be confused, in the previous answer you said this is a hanging line and it is the same thing as a safety line, is that it?

A. Yes, sir.

The Court: On that particular early device, applying to this figure 29, is that correct? [76]

A. Yes, sir.

Q. (By Mr. Joseph F. Westall): I call your particular attention to Moss deposition Exhibit 10-J and to the drawing at the lower left-hand side, showing a line, which you labeled in your advertisement a hanging line. A. Yes, sir.

Q. That is what you generally called that line hung from the top of the spooler, did you not?

A. Yes, sir.

Q. You called it that? A. Yes, sir.

The Court: I want to know what this is so that I can look at it, just what he testified about.

Mr. Joseph F. Westall: He testified this. He

(Testimony of J. C. Ballagh.)

stated it is, as described in there, a hanging line. We had quite a lot of quibbling during the deposition as to whether it was or not.

The Court: You are now testifying about the fourth illustration, about the middle of this exhibit, Exhibit 10-J, is that correct?

Mr. Joseph F. Westall: That is correct, and comparing it with the Moss patent.

The Court: And this is the upper line here, is that it?

Mr. Joseph F. Westall: That is the upper line. Mr. Caughey, one of the objections you made on the pre-trial was [77] that one of the dates shown on these Moss exhibits was in pen and ink at the bottom and you wanted that proof.

Mr. Caughey: I will withdraw that.

Mr. Joseph F. Westall: It will be necessary for us to produce the originals to prove them.

Mr. Caughey: No.

Mr. Joseph F. Westall: You will stipulate that those pen dates in there on Moss Exhibits 10-A to 10-N are correct?

Mr. Caughey: I will stipulate that the dates on which the magazine in which they appear was published, that is, October 21st, for example—that October 21st was the date that appeared on the publication. I have checked them and I can so stipulate.

Mr. Joseph F. Westall: Yes. That will be all.

Mr. Caughey: Inasmuch as this witness was called as an adverse witness and we are going to

(Testimony of J. C. Ballagh.)

use him as a witness in chief, I won't cross-examine him at this time.

The Court: Very well.

Mr. Caughey: I will call this witness as my own witness.

Mr. Joseph F. Westall: Mr. Terry.

J. P. TERRY

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

The Clerk: What is your name, please?

A. J. P. Terry. [78]

Direct Examination

By Mr. Joseph F. Westall:

Q. Is that J. Perry Terry?

A. J. P. is the way I usually put it.

Q. Where do you reside?

A. Huntington Beach.

Q. 603 Main Street? A. That is right.

Q. Did Mr. Moss ever apply to you for material for making a spooler? A. Yes; he did.

Q. Do you know about when that was?

A. Well, I would say it was in November, right around the 21st or the 22nd, of 1936.

Q. Of 1936? A. Yes.

Q. And did you furnish that material to him?

A. Yes; I did.

Q. And what did the material consist of?

A. I would say the pipe was 4-inch pipe the

(Testimony of J. P. Terry.)

best I could remember and I would say 3 feet or something like that long, and then I think there were some clamps; I think there were 4 or 6 clamps he took. And I think that would cover it.

Q. And you furnished that material to him?

A. Yes. [79]

Q. And do you know whether he made a spooler from that material?

A. Well, from the looks of it when he brought it back, it looked like he might have made it out of it.

Q. When did he bring it back?

A. He brought it back, I would say, in four or five days maybe; I wouldn't say exactly; maybe a week.

Q. And he made a spooler? A. Yes.

Q. And he showed it to you? A. Yes.

Q. What was your employment at that time?

A. I was production superintendent under Mr. Andersen.

Q. For the Holly Oil Company?

A. For the Holly Oil Company.

Q. And what has been your experience in the oil fields? What kind of experience have you had?

A. Well, I have had mostly well pulling and production; not very much in drilling.

Q. Did you have anything to do with the testing of that first actual spooler?

A. No; I couldn't say that I had anything to do with it.

Q. You had nothing to do with that?

(Testimony of J. P. Terry.)

A. No.

Mr. Joseph F. Westall: I believe that is all. [80]

Cross-Examination

By Mr. Caughey:

Q. Mr. Terry, as I understand your testimony, Mr. Moss brought to you, after he had secured this material, a line spooler which he had or someone else had built between the time he got the material from you and when he returned?

A. That is right.

Q. Was it assembled?

A. Yes; it was assembled something like that right there.

Q. When you say "that right there," you are talking of the spooler that is shown in this model, is that correct? A. Yes; that is correct.

Q. It wasn't in any well or rig, was it?

A. No. I don't think it had ever been used when I saw it and I don't think it had been used for quite a while afterwards.

Q. And did it have side bridles on it like these?

A. It had the arms on it something similar to that.

Q. Did it have the weights?

A. No. It wasn't rigged up. It was just blank.

Q. Did he have any rubber inserts inside it at all or any rubber bearings?

A. Now, I wouldn't say.

(Testimony of J. P. Terry.)

Q. It might have been just a shell, is that right, just [81] the bare shell?

A. Well, he talked of rubbers there and also hardwood blocks he was going to use but I couldn't say whether he decided to use the rubber or what. But I think eventually it came out with rubber.

Q. That is what you think? A. Yes.

Q. But did you ever see it?

A. See the spooler?

Q. Afterwards, when it was in a well.

A. Oh, yes; I saw it a thousand times after it was in a well.

Q. Down at the Holly? A. Yes.

Q. And you saw it at the rig after the Holly people bought it, is that right?

A. Yes; that is right.

Q. But you are not sure, after he brought it to you the latter part of November or around in there, whether it had any rubber bearings inside or wooden blocks or what?

A. I wouldn't say because he was debating on that stuff when he was talking about it and I wouldn't say whether it had the rubber or the blocks.

Q. And it didn't have the side lines and the weights?

A. No. He just brought it there. He didn't have it [82] hooked up at that time.

Q. How do you fix that date?

A. I can very easily fix that date because on this Conrad well I got my arm broke and was off and

(Testimony of J. P. Terry.)

went to work just about that date, nine months, or later, after. I got hurt on the Conrad the 12th day of May in that year and I know when I was released and when I went back to work. That is how I can verify the dates.

Q. When did you go back to work?

A. I went back to work the 20th of November, 1936.

Q. For the Holly?

A. For the Holly and Holly Development, the two companies.

Q. On what well?

A. I wouldn't say what well because we had lots of wells.

Q. You were working on a particular well, weren't you?

A. No. We had maybe 18 to 20 wells and worked from one well to the other.

Q. And it is your recollection, a short time after you got back, that Mr. Moss contacted you?

A. Yes.

Q. And it might have been, instead of the 21st or 22nd, the 25th or 26th of November, might it?

A. No. I went back on the 20th, and I wouldn't say [83] for sure, as that is a long time, but it was a day or two after I went back to work. I know the date I went back to work. It was just a day or so after I went to work he was after the stuff.

Q. It may have been five or six days afterwards instead of one or two?

A. It might have been one or two. I couldn't say exactly.

(Testimony of J. P. Terry.)

Q. May it have been 10 days before he brought it back instead of a week, as you have testified?

A. I wouldn't say. It might have been five days or might have been a week. It was a short time, I would say.

Mr. Caughey: That is all.

Mr. Joseph F. Westall: That is all. Mr. Claude Kelley.

CLAUDE KELLEY

called as a witness for the plaintiffs, being first duly sworn, testified as follows:

The Clerk: What is your name, please?

A. Claude Kelley or J. E. Kelley.

Direct Examination

By Mr. Joseph F. Westall:

Q. Where do you reside, Mr. Kelley?

A. You will have to speak louder.

Q. Where do you reside?

A. In Indio, California. [84]

Q. What is your occupation at the present time?

A. Well, I am a rancher and a water well driller.

Q. How long have you been in the oil well drilling business?

A. Well, up till four years ago.

Mr. Caughey: Just a second. May your Honor please, I didn't recall he was an oil well driller. He said he was a water well driller, a water well driller at present.

(Testimony of Claude Kelley.)

Q. (By Mr. Joseph F. Westall): Were you ever engaged in the business of developing or producing oil?

A. Yes, sir. I went to work in 1908, and quit four years ago. I was in it continuously.

Q. What kind of experience did you have during that time? What did you do?

A. Well, I guess all of it, drilling, roughnecking and supervising.

Q. Were you superintendent at any time?

A. That is right; pushing tools, they call it; foreman.

Q. Did you ever have anything to do with Republic Petroleum Well No. 2? A. I did.

Q. Do you know whether a line spooler was used on that well? A. I do. [85]

Q. Whose line spooler was put on that well?

A. Well, I suppose it was Moss', Perry Moss. He was the one that brought it out.

Q. I show you the drawings of the Moss patent in suit No. 2,190,880, granted February 20, 1940, and ask you if you can examine those drawings briefly and if you understand what the construction means. You don't need to read the patent. Just look at the drawings. A. Yes, sir.

Q. Did the line spooler that was put on Republic Well No. 2, which you say you believe was Moss' spooler—was it like that shown in the Moss patent?

A. Yes, sir.

Q. It was? A. Yes, sir.

Q. Do you know when it was put on that well?

(Testimony of Claude Kelley.)

A. The date?

Q. Yes.

A. No; I don't. It was in, I should say, the latter part or the first part of August, 1937.

Q. You haven't anything to refresh your recollection as to a more approximate date, have you? Was it as early as August?

A. No; I don't. It was——

Q. I show you a folder of what purports to be drillers' [86] daily reports, Republican Petroleum Co. lease, El Segundo, Well No. 2, and purporting to be drillers' reports——

The Court: Is that Republican or Republic?

Mr. Joseph F. Westall: Republic—drillers' reports from July 18, 1937, to August 23, 1937, and ask you if those in any way refresh your recollection as to the date of purchase and use of the Moss spooler.

A. I remember the well and I remember the spooler but I didn't remember the dates exactly. I knew it was in July or August or I thought that.

Q. You think it was in July or August?

A. Yes.

Q. Are you positive it was in July or August?

A. Yes; that is right.

Mr. Joseph F. Westall: We offer the drillers' daily reports shown to the witness in evidence as plaintiffs' exhibit next in order.

Mr. Caughey: For what purpose?

Mr. Joseph F. Westall: Well, we will withdraw the offer. It was only for the purpose of giving

(Testimony of Claude Kelley.)

the witness a chance to refresh his recollection if he needed it.

Q. Now, do you know whether that spooler was used on Republic Well No. 2? A. Yes, sir.

Q. And was it successful? [87]

A. Yes, sir.

Q. And did it have a hanging line on it?

A. That is right.

Q. And from what part of the spooler was the hanging line suspended? A. From the top.

Q. On the top? A. Yes, sir.

Q. Are you familiar with the spoolers put out by the Patterson-Ballagh Corporation before its dissolution? A. No; I am not.

Q. Where the hanging line was down in the middle? A. I have seen them; yes.

Q. You have seen them? A. Yes.

Q. Can you say whether or not the hanging in the middle that way makes a successful spooler or should the hanging be from the top?

Mr. Caughey: That question is objected to as no proper foundation is laid. The witness has stated that he saw them but he didn't know anything about them other than seeing them, unless you can lay a foundation.

The Court: You, first, should find out whether he knows.

Q. (By Mr. Joseph F. Westall): Do you know whether or [88] not a spooler having a hanging line over the center would be a practical form of spooler?

(Testimony of Claude Kelley.)

A. Well, I shouldn't say but, from my experience, I would say no.

Q. You never had any experience with that?

A. No.

Mr. Joseph F. Westall: I believe that is all.

Cross-Examination

By Mr. Caughey:

Q. You say, Mr. Kelley, that you never had any experience with the Patterson-Ballagh line spooler?

A. Not to my memory or knowledge; I don't remember it. Perhaps I worked on rigs sometimes where it was but I don't remember.

Q. Then, on what do you base your statement that a line hung in the middle, in your opinion, wouldn't be practical?

A. Well, I will tell you. You understand a line spooler is hanging about 20 feet above the drum, don't you?

Q. Approximately.

A. And your derricks are 136 to 178 foot and you have got all that line above you. You are pulling that block up through the derrick at a tremendous speed and that line is traveling always; and, when you kick your clutch off, your line is more or less floating above that spooler. You know, [89] your line is absolutely loose. If you touch your brake a little bit, you draw slack in your lines.

Q. What line are you referring to as loose?

(Testimony of Claude Kelley.)

A. The drilling line. And then it would, naturally, fall over, I would say.

Q. What would you say would fall over?

A. The line spooler.

Q. It is threaded on the wire line, isn't it?

A. Your line is slack, too.

Q. How could it fall over?

A. If it was hung in the middle, there is nothing to keep it from falling over that I see.

Q. As soon as you get your line tight again, it is in the proper position, isn't it?

A. That is right.

The Court: It would fall over if what was present?

A. Well, when you start to slow your blocks down, you are going up at a terrible speed, and you shut your motors off and that line is almost slack. You can see it floating in the rig above the line spooler.

Q. But what would keep it from falling over?

A. When the line tightens up again, it straightens up again, but I would say, if it is hung from the top, the line couldn't fall over. I have never seen them the other way. That would be my idea of it. [90]

Q. (By Mr. Caughey): As a practical oil man, you would know it would be better to hang it from the top, wouldn't you?

A. That is right; I would say that.

Mr. Caughey: That is all.

Mr. Joseph F. Westall: That is all. Mr. Welch.

E. B. WELCH

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

The Clerk: What is your name, please?

A. E. B. Welch.

Direct Examination

By Mr. Joseph F. Westall:

Q. You reside at 7823 East Rose Avenue, Bellflower, California? A. Yes, sir.

Q. What is your business or occupation?

A. Right now I am working on production; otherwise, a pumper.

Q. You are working for what company?

A. E. B. Hall & Company of Wilmington.

Q. How long have you been experienced in oil well drilling or other matters pertaining to the development and production of oil?

A. Since 1922, in California. [91]

Q. And what has been the nature of your experience during that time?

A. Roughnecking and drilling; drilling quite a few years.

Q. I don't know whether his Honor knows what a roughneck is.

The Court: I think I have seen some in my life.

A. It is an oil worker.

The Court: Yes; I know what you mean.

Q. (By Mr. Joseph F. Westall): Did you ever see a line spooler made by Mr. Moss?

A. Yes.

(Testimony of E. B. Welch.)

Q. And did you see such a line spooler at any time on Well No. 2 of the Republic Petroleum Company at El Segundo? A. Yes.

Q. And do you know when you saw that or can you fix the time by refreshing your recollection by an examination of the drillers' daily reports of that well? A. Yes.

Q. Do you know when—the log, I believe, starts or says the well was started July 18, 1937, and worked on until August 23, 1937. Is that correct?

A. Yes, sir.

Q. Do you know during that time when it was that this first spooler that you saw on that well was used? [92]

A. I couldn't specify the exact date that I saw that spooler but we started to redrill there on the 18th and some time along there that spooler was put up.

Q. The 18th of July? A. July, 1937.

Q. Do you know whether that Moss spooler operated successfully? A. Very much so.

Q. And did it have a hanging line?

A. Yes, sir.

Q. How was the spooler suspended by the hanging line?

A. From the top hanger, up the derrick about 45 or 50 feet.

Q. You say from the top hanger. Do you mean from the top of the spooler?

A. From the top of the spooler, where that ring is.

(Testimony of E. B. Welch.)

Q. Did you ever see a Patterson-Ballagh spooler? A. Yes.

Q. Do you know how prior to that time they hung their spooler?

Mr. Caughey: May your Honor please, he didn't specify when he saw it. The question is prior to that time. Ask him when he saw the Patterson-Ballagh.

Mr. Joseph F. Westall: I withdraw the question.

Q. You say you saw a Patterson-Ballagh spooler at some [93] time.

A. Well, it was along about that time because the company I worked for had one of those.

Q. When you say about that time, that was between July 18, 1937, and August 23, 1937, that you saw it? A. Yes, sir.

Q. Did that have a hanging line on it?

A. Yes.

Q. Where was that hanging line attached?

A. In the center.

Q. In the center of the spooler?

A. Yes, sir.

Q. How many eyes did it have for suspension?

A. One.

Q. And that was in the center? A. Yes.

Mr. Joseph F. Westall: I believe that is all.

Cross-Examination

By Mr. Caughey:

Q. Pardon me. I didn't get your name.

A. E. B. Welch.

(Testimony of E. B. Welch.)

Q. How long have you been working for Hall?

A. Going on six years.

Q. Are you working down at the Harbor now?

A. Yes. [94]

Q. And you were working for the Republic, you say, in 1937? A. Yes.

Q. What was your position there at the Republic? A. Driller.

Q. On that Republic No. 2? A. Yes.

Q. And you stayed on that well until it was drilled? A. Yes.

Q. You said something about another well of the Republic, on which you saw a Patterson-Ballagh spooler. You say it was about that time. Have you any recollection on that?

A. No, because we were working on several wells there and moving from one to the other and redrilling, and I don't know when it was put up or anything about it. I know when I came back one time it was hanging in one of the derricks. I don't know when it was installed. And that was a Patterson-Ballagh spooler.

Q. It may have been after you completed the Republic No. 2? A. It could have been.

Q. You say that was hung in the middle?

A. Yes.

Q. Was a line attached to it at the time?

A. Oh, yes; we kept a line attached to it in the center. [95] We always kept a line otherwise for a hanger and a safety line regardless and the place to tie onto that spooler was in the middle.

(Testimony of E. B. Welch.)

Q. Did you only have one line on that spooler?

A. As near as I can look back, we only had one line on it.

Q. Did you have more than one line on the Moss spooler? A. I can't recall.

Q. But you do recall the hanging line?

A. Yes.

Q. And you do recall definitely it was hung at the top? A. Yes.

Q. Do you recall what the thickness of that Moss spooler was? When I say "thickness," I mean the outside dimensions all the way through.

A. Oh, I guess the o.d. of it was around 3 or 4 inches.

Q. Where was the eye to which the line was hung. Was it on the outside of the o.d., that is, was it beyond the outside periphery of the shell?

A. It was on the shell.

Q. Like shown there?

A. Right on the top. [96]

Q. So it would be about five or six inches from the wire line, the place where it was hung?

A. No; it wouldn't be that far. It was hung on the metal casing top, an inch or so down on that.

Q. How far would you say?

A. There is a good diagram of it right there; just like that right there.

Q. But this isn't to scale.

A. Well, that is very close to it.

Q. How long was that spooler?

(Testimony of E. B. Welch.)

A. I would say 30 inches. I never measured it. That is just offhand.

Q. It might have been 40, as far as you know?

A. No; it wasn't that far.

Q. Did you have anything to do with hanging it? A. No.

Q. You just saw it up in the well?

A. No; I operated it; I worked there when they had that spooler there.

Q. It was up there when you saw it?

A. I can't recall of helping hang it up or putting it up. It might have been put up when I was off shift. That is quite a while back.

Q. But you do recall seeing it up there in the air, hanging? [97] A. Oh, yes. I operated it.

Q. And that was about 20 feet up or what, or 30 feet?

A. I would say 20 feet from the floor.

Q. In your best judgment of the length, though, it was approximately 30 inches?

A. Right offhand, that is my best judgment.

Q. Do you know how many rubber bearings it had inside? A. It had three.

Q. How do you know that?

A. Well, because sometimes we had to put in new ones and take it apart.

Q. Did you put in some new ones?

A. No, but we would have to take a line out to change to a new line, and we would open up the spooler and, when you did that, you could see what was inside of it.

(Testimony of E. B. Welch.)

Q. In your recollection, it had three rubber bearings?

A. Three rubber bearings, the top, center and the end.

Q. How much distance was there in between each one?

A. Well, I don't know. You will have to figure that out. I said the whole thing. Anyway, it was 30 inches and the center one was right in the center of it. I can't figure out how long the rubber bearings were.

Q. How long was each rubber bearing?

A. Oh, five inches.

Q. Are you guessing or is this what you remember? [98]

A. I never measured it. I am just telling you what I think it would be.

Q. That is what you think it would be?

A. Yes.

Q. You are a practical oil man in the field, are you not, Mr. Welch? A. Yes, sir.

Q. You have had a lot of experience?

A. I have.

Q. It would be apparent to you it would be better to hang a line at the top up to the derrick than to put it in the middle and hook it up the same way, wouldn't it? A. It would be better at the top.

Q. That would be apparent to you?

A. Yes.

Q. As a practical man in the field?

A. That is what I would say.

Mr. Caughey: That is all.

The Court: We will take a recess at this time of 10 minutes.

(Short recess.)

Mr. Joseph F. Westall: Mr. Heard.

R. J. HEARD

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows: [99]

The Clerk: State your name, please.

A. R. J. Heard.

Direct Examination

By Mr. Joseph F. Westall:

Q. Mr. Heard, where do you reside?

A. At Artesia, New Mexico.

Q. You came out here for one reason, to testify, is that correct?

A. I came out here on business but it just happened to be——

Q. It happened to be convenient to testify?

A. That is right.

Q. What is your occupation?

A. General superintendent for the Grayburg Oil Company at Artesia, New Mexico.

Q. How long have you had experience in oil well development or production?

A. Since 1919.

Q. And what has generally been your experience during that time, what capacities?

(Testimony of R. J. Heard.)

A. Rotary helper, driller, tool pusher and superintendent.

Q. Are you familiar with the Moss line spooler as the same was used at the El Segundo Well, Republic Petroleum Well No. 2? [100]

A. Yes, sir.

Q. In order to refresh your recollection, I place before you the drillers' daily reports—well, no; those are the wrong ones—of said Well No. 2, which appears to be from July 18, 1937, to August 23, 1937, and ask you to state when it was that you saw that Moss line spooler.

A. The only way I would remember it is just by looking at the reports, which would be January 18, 1937, to August 23, 1937.

Q. July 18, 1937, to August 23, 1937?

A. Yes, sir.

Q. It was some time between those dates?

A. Yes, sir.

Q. What was your capacity as connected with the Republic Petroleum Well No. 2 at that time?

A. I was the superintendent at that time.

Q. Can you state how that Moss spooler was hung in the derrick?

A. Yes, sir; from the top.

Q. From the top? A. Yes, sir.

Q. Of the shell? A. Yes, sir.

Q. And the other end was connected to one of the girts in the derrick, is that correct? [101]

A. I couldn't say that for sure; I don't remember that particular.

(Testimony of R. J. Heard.)

Q. It was where it was attached to the derrick, at the upper end? A. Oh, yes; that is right.

Q. Had you ever before that time seen a spooler that was hung from the top like the Moss spooler?

A. No.

Q. Was there any advantage in it being hung from the top?

A. Well, we all figured it was and it seemed to operate better.

Q. And what function did it perform by being hung at the top?

A. Well, one advantage was, when you changed a line through it, it wouldn't turn.

Q. It kept it balanced? A. That is right.

Q. And what did it have to do with the drilling line by being hung from the top?

A. Well, you fastened it in the center of the derrick up above and it seemed to ride back and forth better.

Q. Did you ever see a Patterson-Ballagh spooler? A. Yes, sir.

Q. Do you know how that was hung? [102]

A. Well, it was hung from the middle. What makes me remember it so well is we used to take the line out of the spooler to change lines and it would always turn sideways and you would have to get up in the derrick and pull the top of it back in order to get your line through.

Q. As soon as you loosened that, it would tip over?

(Testimony of R. J. Heard.)

A. Yes; whenever you would take your line out, it would turn crossways.

Q. Do you know when it was that you saw that Patterson-Ballagh spooler?

A. We had one at El Segundo at that time.

Q. When was that?

A. It was just about the same time.

Q. How did you happen to have your experience with the Moss spooler at that time?

A. Well, Mr. Moss came down to our No. 8 well when we were working there and showed me this spooler before we put it up on the No. 2 well.

Q. And did you purchase it?

A. No; we didn't.

Q. Did you try it? A. Yes; we tried it out.

Q. And did it work successfully?

A. It sure did.

Q. How does it happen that you didn't buy it? [103]

Q. Well, at that time that was the last well we drilled in El Segundo and we shut down and didn't have any more rigs running for a year or so. In fact, we sold off most of our equipment.

Mr. Joseph F. Westall: You may cross-examine.

Cross-Examination

By Mr. Caughey:

Q. Mr. Heard, you testified, I believe, that, when you had the hanging line at the top, it would ride better back and forth? A. That is right.

(Testimony of R. J. Heard.)

Mr. Joseph F. Westall: May I interrupt just a minute? We have had a number of witnesses who have completed their testimony and we will not need them any more and, unless counsel needs some of them, I would suggest that they be excused.

Mr. Caughey: That is perfectly satisfactory.

Mr. Joseph F. Westall: All witnesses, then, who have heretofore testified, will be excused.

The Court: If they wish to leave, they may do so, those who have already testified.

Mr. Caughey: May I have the question and the answer?

(Record read.)

Q. (By Mr. Caughey): What do you mean by "ride better back and forth"? [104]

A. With reference to this model, for example, you see, when it is hung from the top, it hangs straight with your line and, if it is hung in the middle, it more or less throws your spooler in a bind on your line.

Q. That was apparent to you as a practical man, that it would be better to hang it from the top?

A. After he showed us all of that, after he showed us, I don't see why I didn't think of it, but I didn't.

Q. It was apparent to you as soon as he showed it to you? A. Yes; it sure was.

Q. You say the Patterson-Ballagh spooler that you saw was hung in the middle? A. Yes, sir.

(Testimony of R. J. Heard.)

Q. And you said, when the line got slack, it would have a tendency to fall over?

A. You see, in changing lines, you have to take the line off of your drum and pull it out of the spooler and, when we would, it would, naturally, turn sideways and lay down like that and, when we got ready to put the line back in, you would have to go up and pull the line back there, and this line you didn't have to pull it back.

Q. In other words, as soon as the line was taken out there, it would just hang and be suspended by the side lines?

A. No; your hanging line would hold it back but it [105] would turn.

Q. So there won't be any confusion, I will start again. Your testimony is that, when the line was in the middle of Patterson-Ballagh, when you took the wire line out of the hole, then, although the spooler itself might be suspended to a certain extent by the side lines, nevertheless, it would have a tendency, because of this line, to tip over and go horizontally? A. That is right.

Q. Whereas, if you have it suspended from the top, that wouldn't happen? A. That is right.

Q. And you noticed that the first time you took the line out, didn't you?

A. Yes; and we had lots of complaints from the crews just on that account. Of course, it doesn't take much to get complaints from the crews but that was one of them.

Q. Was that the only Patterson-Ballagh spooler that you recall having anything to do with?

(Testimony of R. J. Heard.)

A. No; I used one in New Mexico here a year ago.

Q. And that was hung at the top, was it?

A. It was hung at the top.

Q. But in the interim you didn't have anything to do with any line spoolers, in between?

A. No, because I have been down in that country and we [106] haven't been using them.

Q. Did you have anything subsequent to do with any line spooler from the time you had anything to do with it on Republic No. 2?

A. No; I sure haven't.

Q. What was the name of the concern you said you were with?

A. Grayburg Oil Company of Artesia, New Mexico, which the Republic Petroleum Company owns. You see, I am still with the Republic Oil Company.

The Court: When that line was slack, would that whole spooler fall?

Mr. Caughey: Yes. I think I can illustrate it very readily. If you have something or hold something in the middle and have a line up here, it will, naturally, fall over horizontally when there isn't anything otherwise to hold it up.

The Court: If the line was slack—or when would the line get slack?

Mr. Caughey: The line might get slack when it was a loose line. There wouldn't be anything through the spooler at all if you take the line out of the hole in which——

(Testimony of R. J. Heard.)

The Court: I understand, but, when the line was in the spooler and the line was slack——

Mr. Caughey: It might be momentarily [107] slack.

The Witness: We have roller-bearing blocks and cranks and, in order to speed, you would go up and put your brake on your blocks, keep going on up, and it will throw slack. I have seen them go out of the derrick three or four feet.

The Court: Saw what go out?

A. The line, the fast line that comes down through the spool.

Q. (By Mr. Caughey): There would be some cases where you would have momentary slack but it wouldn't last very long?

A. No; it wouldn't.

The Court: That might occur where there was a sudden stopping of the line, would it?

A. That is right.

The Court: And would that same situation obtain whether it was hung at the center or at the top?

A. The slack would, sure, but, if it is hung from the top, it wouldn't tip over.

The Court: That is to say, the spooler wouldn't tip over?

A. The spooler wouldn't tip over but, if hung from the middle, it naturally, would tip over. That is my opinion.

Q. (By Mr. Caughey): If the spooler did tip

(Testimony of R. J. Heard.)

over, what harm would that do? What would be the harm of that?

A. Naturally, when it came back down, straightened, it might go back over and hit a girder or something like that. [108] In other words, when that straightens up, it could go back and hit a girder or something like that.

Q. Did you ever see that happen?

A. Well, I don't know as I ever did.

The Court: This would be suspended in the center of the derrick about, wouldn't it, or not?

A. No; it would be in the center of the derrick this way. It would be pretty close to the girts where the line is.

The Court: Towards the rear?

A. Yes, sir.

Mr. Caughey: That is all.

Redirect Examination

By Mr. Joseph F. Westall:

Q. Just one question. At the time you put in and used that Moss spooler and you say Mr. Moss explained it to you before you tried it, did he state that he had, previous to that time, ever tried it out and used it or tested it?

Mr. Caughey: That is objected to as calling for hearsay testimony and a self-serving declaration.

The Court: I think that would be self-serving, what he stated to this witness.

Mr. Joseph F. Westall: That may be so. I will withdraw the question. I believe that is all.

(Testimony of R. J. Heard.)

A. Is that all? [109]

Mr. Joseph F. Westall: That will be all. Mr. Horan.

B. A. HORAN

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. B. A. Horan.

Direct Examination

By Mr. Joseph F. Westall:

Q. Your first name is Barney?

A. Barney.

Q. Where do you reside?

A. Fullerton; 113 West Brookdale Street.

Q. What is your business or occupation?

A. Well, oil worker and driller at the present time.

Q. How long have you been engaged in either development or production of oil wells?

A. I have been in it better than 20 years.

Q. During that time, what has been the nature of your experience?

A. Roughneck and drilling and pushing tools.

Q. Did you ever see a line spooler on Holly Oil Company No. 7-A Well? A. Yes.

Q. Did you have anything to do with the working of it?

A. I worked there as a roughneck. [110]

Q. Do you know whose line spooler that was?

(Testimony of B. A. Horan.)

A. Yes; it was Moss' spooler. The boss told me it belonged to Mr. Moss. The driller there at that time told me that.

Q. Do you know how it was suspended in the derrick, the Moss spooler that you are speaking of?

A. The Moss spooler was suspended from the top of the derrick, 40 feet up.

Q. Had you ever seen that kind of a suspension by the spooler in a derrick before?

A. No, sir.

Q. Had you ever seen any of Patterson-Ballagh's spoolers?

A. Yes, sir; I had the opportunity of using it on a well.

Q. And can you state when you first saw one of the Patterson-Ballagh spoolers?

A. On this particular well it was the last of 1938.

Q. And do you know how that spooler was hung?

A. Yes; it was suspended from the middle, a center hang.

Q. Then you saw other spoolers of Patterson-Ballagh since that time, since 1940?

A. Yes, sir; we had in South America 15 complete sets.

Q. You spent some time in South [111] America? A. Yes.

Q. For whom were you working at that time?

A. The International Petroleum.

Q. How long were you in South America?

(Testimony of B. A. Horan.)

A. Two years and a half.

Q. Did you see the operation of those spoolers there? A. Yes; we had them on the rig.

Q. And those were spoolers that were all hung, Patterson-Ballagh spoolers, from the top?

A. Yes, sir.

Q. Do you know whether or not they now hang any of those spoolers from the center instead of the top?

A. I believe they are all a new design; from the top.

Mr. Joseph F. Westall: I believe that is all.

Cross-Examination

By Mr. Caughey:

Q. What well was it, Mr. Horan, that you saw this Patterson-Ballagh spooler on, that was hung from the middle?

A. At that time I was drilling for the Bartholomew Corporation.

Q. Where? A. Brea.

Q. At what time?

A. In the last of 1938; Well No. 5.

Q. Are you sure that that was hung from the middle? [112]

A. It was, sir; it had both from the inside, the first style that was made.

Q. Was that a cast spooler? Was it a casting?

A. I won't say whether it was casted or not. It was bolted.

(Testimony of B. A. Horan.)

Q. What is your recollection?

A. I believe it was casted.

Q. You said it was bolted. Do you mean by that it wasn't hinged? A. Flanged; two pieces.

Q. It wasn't hinged? A. No, sir.

Q. Did it have two eyes at the top, with bridles at——

A. There were no eyes, none whatsoever, at the top.

Q. Even side eyes?

A. Side arms—they had wire line for arms at the top.

Q. How were they attached to this spooler?

A. There was an eye at the side about, I should judge, six or eight inches from the top to the bottom, with an eye on each side and a wire line in it.

Q. About six or eight inches down, is that correct?

A. On the sides; your arms, with an eye in the middle, in the back, to hang from.

Q. Was only one eye on it? [113]

A. Yes, sir.

Q. Not two? A. One.

Q. And that one eye was in the middle?

A. In the back.

The Court: Where would that be on that?

Mr. Caughey: About right there. Is that correct?

A. It would be on the back side.

Q. About right there? A. Yes, sir.

(Testimony of B. A. Horan.)

Q. Are you sure there weren't any eyes at the top?

A. No, sir; because, when the line was taken out, it turned over flat.

Q. And no eyes on the other side?

A. No, sir.

The Court: Just one eye or more than one eye?

Mr. Caughey: He said only one eye.

A. Just one eye.

Mr. Caughey: That is all.

Mr. Joseph F. Westall: Now, if the court please, the next we have in order is the reading of the deposition of Mr. Moss. I have a certificate here from the physicians who are attending him showing that he is utterly unable to attend and give testimony in this case. [114]

The Court: Is there any objection?

Mr. Joseph F. Westall: I would like to file it and offer it in evidence.

The Court: Do you offer the entire deposition in evidence?

Mr. Caughey: It will have to be read, your Honor, as there are certain objections.

Mr. Joseph F. Westall: We offer this in evidence as the next exhibit.

Mr. Caughey: I won't raise any question at all as to Mr. Moss being unable to be present.

Mr. Joseph F. Westall: Then, if you will stipulate that the deposition may be read——

Mr. Caughey: That is entirely satisfactory.

Mr. Joseph F. Westall: I don't believe I need

to read the introductory part but it is a deposition taken on Thursday, September 18, 1947, at 10:00 a.m., before a notary public in this County, and the appearances of counsel are the same as in this case at the present time.

PERRY M. MOSS

"Perry M. Moss, the plaintiff herein,—" at that time he was the sole plaintiff—"produced as a witness on his own behalf, being first duly sworn on his oath, testified as follows:

"Direct Examination

"By Mr. Westall:

"Q. Please state your name, residence [115] and occupation.

"A. Perry M. Moss, 296 Kennebeck, Long Beach; oil worker.

"Q. Long Beach? A. Long Beach.

"Q. You are of legal age, are you not?

"A. Yes, sir.

"Q. You are the plaintiff in the action in which these depositions are being taken, are you not?

"A. Yes.

"Q. The original complaint in the action in which your deposition is being taken was filed July 18, 1946. Will you explain, please, why you did not file it before that date?

"A. I got my patent February 20, 1940.

"Q. That is when it was granted?

"A. When it was granted.

(Deposition of Perry M. Moss.)

"Q. Yes.

"A. And in March, 1940, I turned my patent over to Carl E. Cameron, Long Beach attorney.

"Q. Yes; what time in March?

"A. Well, it was along the first of March, and he notified Patterson-Ballagh Corporation the 14th of April, 1940." [116]

* * *

Mr. Joseph F. Westall: "Mr. Westall: You can proceed with the answer.

"A. They notified the Patterson-Ballagh Corporation April 14, 1940, as infringing. [117]

* * *

"Q. (By Mr. Westall): I wish you would state what your condition of health is at the present time.

"A. I am in bed at the present time, under doctor's care. I am up here against his protests."

Now, right here, there were a few little typographical errors and I noted them in my copy as corrected. The next sentence reads, "He objected to my coming. I will never get any better as long as I live, so I had to do it. I am in very poor health. The bottom part of my lungs is plugged. I only get about sixty per cent of the air I should get. Therefore, I am very, very short of breath.

"Q. You are the patentee of United States Letters Patent No. 2190880, charged to be infringed in this action, are you not? A. Yes.

(Deposition of Perry M. Moss.)

"Q. What has been your training or experience in the oil fields?

"A. I am a practical man, with thirty-three years' experience, as a practical oil man. [118]

"Q. Have you ever had any particular special experience with line spoolers such as involved in this case?

"A. Yes, I know the line spoolers thoroughly.

"Q. And how long have you given your attention to understanding the line spooler and knowing its operation?

"A. Since April the 5th, 1937.

"Q. Have you read and do you understand the specifications, drawings and claims of said Letters Patent charged to be infringed, No. 2,190,880, granted to you February 20, 1940, a copy of the specifications and drawings of which I now show you and which I request the notary to mark for identification as Moss Deposition Exhibit 1."

And then the document referred to was marked by the notary for identification as Moss Exhibit 1.

"The Witness: Read the question again, please."

The question was read.

"The Witness: Yes, I understand what the patent is.

"Q. (By Mr. Westall): Will you explain briefly the nature of the device of said last-mentioned patent in suit in a general way and its function and mode of operation?

"A. It is a piece of four-inch pipe, four feet long, milled in half, and each side—and it's hinged

(Deposition of Perry M. Moss.)

together so it can be hung in the derrick, and while it is hanging in the derrick the bearings replace very easily with very little trouble, and on each side it has rigid arms. Each rigid arm [119] has a rope attached, going out to the side of the derrick, through a pulley, and that rope is attached to a weight, and the line the spooler is hung thirty or forty feet in the derrick above the spooler over the center of the drum.

"Q. You mean the drum upon which it is hung?"

The correction at the end of the deposition is:

"Q. You mean the drum upon which the drilling line is spooled?

"A. Yes. And on top of the spooler it has an eye welded for a hanging line, and one end of the hanging line is attached to the spooler on top and the other end tied in the derrick to hold the spooler in place at all times.

"Q. And at what angle will that spooler hang when it is so supported in the derrick by the hanging line?

"A. Well, like it is made, you hang it from the top, it hangs just as near the drilling line as you can get it, within three or four degrees, it is the same as the drilling line, and being hung from the top takes the friction off the bottom and top of your spooler to eliminate the wear on your bearings.

"Q. Have you ever granted any rights, that is, assigned, in whole or in part, transferred, encum-

(Deposition of Perry M. Moss.)

bered or granted any license under said Letters Patent in suit No. 2,190,880? A. No.

"Q. Are you still the sole owner of the Letters Patent [120] in suit heretofore mentioned?

"A. Yes.

"Q. Have you ever manufactured or caused to be manufactured the devices of your said patent in suit No. 2,190,880? A. Yes.

"Q. When did you so make or cause to be made the device of your said patent in suit?

"A. You mean by device one I made?

"Q. Yes.

"A. I made the first line spooler in 1936. I started to make it in 1936, in November, the 23rd, and I completed it within three days.

"Q. Please state whether or not you marked any such devices made or caused to be made by you with any patent marking? A. Yes."

The Court: Pardon me just a moment. Did you read that correctly?

Mr. Caughey: As far as I am concerned, with the corrections as indicated as we go along, it will be satisfactory that the reporter copy the deposition as it appears. I appreciate that as you go along you may drop a word now and then.

Mr. Joseph F. Westall: The reporter can put it in the record the way it appears here. [121]

* * *

"Q. Please state whether or not you marked any such devices made or caused to be made by you with any patent marking? A. Yes.

(Deposition of Perry M. Moss.)

"Q. What patent marking did you place on any of the devices made or caused to be made by you under said Letters Patent in suit 2,190,880, and how did you place such notice?

"Mr. Caughey: Just a second. Are you referring to the time prior to or subsequent to the issuance of the patent? Otherwise, objection is made.

"Mr. Westall: Well, I am referring to the first ones before the patent is granted now.

"The Witness: No, I didn't mark the first ones I built." [122]

* * *

"Q. (By Mr. Westall): Well, what patent marking did you place on any of the devices made or caused to be made by you under said Letters Patent, that is, after the grant of the patent in suit, and how did you place such notice?

"Mr. Caughey: Just a second. That is objected to on the ground that there is no evidence in the record that there has been any manufacture subsequent to the issuance of the patent, and assuming facts not in evidence.

"Mr. Westall: I will withdraw that question.

"Q. After the grant of your Letters Patent in suit, did you make or cause to be made under said Letters Patent in suit 2,190,880 any of said devices?

"A. Yes.

"Q. And when did you make the first of those devices after the grant of your said Letters Patent in suit?

(Deposition of Perry M. Moss.)

"A. You mean after I got my patent?

"Q. Yes.

"A. Well, I was making them at the time I got my patent and I never did stop making them.

"Q. Well, after you got your patent, you made at least one, didn't you? A. Oh, yes. [123]

"Q. Please state whether you placed any marking on said device which you made after you got your patent? A. Yes.

"Q. How did you so mark and what was said mark?

"A. My patent number is casted right on my hinge.

"Q. Patent No. 2,190,880?

"A. That is right.

"Q. Immediately after you got your patent?

"A. That is right.

"Q. Then after that did you mark or cause to be marked as you have just described all devices made under your said patent in suit?

"A. Yes, I did."

I don't know whether the court understands but that is constructive notice of the grant and issuance of the patent.

Proceeding with line 17, "Q. With that patent marking 'Patent' with the number of the patent?

"A. Yes.

"Q. Have you in your possession and can you produce any plate or stamp or die showing the marking you placed or caused to be placed on such

(Deposition of Perry M. Moss.)

devices made under your Letters Patent in suit after the grant, of course? A. Yes——"

I don't know what that "of course" means.

"A. Yes, I have it right on my hinge pattern (witness producing an [124] article).

"Mr. Westall: Before we proceed with that, however, we heretofore had the patent in suit marked for identification as Moss Deposition Exhibit 1. I now offer that patent in evidence as Moss Deposition Exhibit No. 1."

We now offer the patent in evidence as that number.

Mr. Caughey: No objection.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 1 in evidence.

Mr. Joseph F. Westall: "Q. In answer to the last question, you produced a pattern made of wood and with the raised letters in it 'Patent No. 2,190,-880.' Please state whether or not that represents the pattern of the stamp that you have placed upon devices manufactured by you after the grant of your Letters Patent as you have heretofore described.

"A. Yes.

"Mr. Westall: We offer in evidence as Moss Deposition Exhibit 1A the pattern just identified by the witness.

"(The notary marked the item above referred to as Moss Deposition Exhibit 1A.)"

Which we now offer in evidence as Plaintiffs' Exhibit 1-A.

The Court: Is there any objection?

(Deposition of Perry M. Moss.)

Mr. Caughey: No objection.

The Court: It may be received. [125]

The Clerk: Plaintiffs' Exhibit 1-A in evidence.

"Q. (By Mr. Joseph F. Westall): Were any of said devices manufactured or sold or distributed by you, with your permission, not so marked 'Patent No. 2,190,880,' as you have described?

"A. No.

"Mr. Caughey: If it is subsequent to the issuance of the patent, I have no objection.

"Mr. Westall: Read the question, Mr. Reporter.

"(The reporter read the pending question.)

"Q. By your last answer, do you mean after the grant of the patent when you so marked?

"A. Yes.

"Q. When did you first notify defendant in this case of the grant and issuance of your patent and protest against infringement of your said patent in suit by defendant? A. April 14, 1940.

"Q. Was such notification to which you have just referred in writing or was it oral?

"A. In writing.

"Q. In what did said notice in writing consist?

"A. Notified the Patterson-Ballagh Corporation as infringing.

"Mr. Caughey: Just a minute. That is objected to as not the best evidence and motion is made to strike the same. [126]

"Mr. Westall: It is just a preliminary foundation.

(Deposition of Perry M. Moss.)

"Q. Who wrote the letter?

"A. Mr. Carl E. Cameron, attorney at Long Beach, California.

"Mr. Westall: Mr. Caughey, I have heretofore served upon you a notice to produce, a copy of which I now hand to the notary, first letter dated April 17, 1940, from Carl E. Cameron, attorney for the above-named plaintiff, to Patterson-Ballagh Corporation, Ltd., 1900 East 65th Street, Los Angeles, California, and second letter from Carl E. Cameron, attorney for said plaintiff, dated May 10, 1940, to Lyon and Lyon, attorneys at law, 811 West Seventh Street, Los Angeles, California.

"Mr. Caughey: Let the record show that the originals of the letters have been produced and handed to counsel for the plaintiff, and defendant will stipulate that letters were received in the usual course of business and they have been retained in their custody, shortly after the dates indicated according to the mail deliveries, and we will further stipulate that the date of receipt of the letters is indicated by the respective stamps shown thereon.

"Mr. Westall: One of them, on the letter of April 17, being a Patterson-Ballagh stamp, and the other one, on the letter of May 10, being May 13, and a Lyon and Lyon stamp.

"Mr. Caughey: That is correct. And it is [127] agreeable that copies of these letters may be substituted, and we will agree that they may be introduced with the same force and effect as the original."

(Deposition of Perry M. Moss.)

The Court: Just a moment. I don't quite understand what you mean there, one of them on the letter of April 17th, being a Patterson-Ballagh stamp.

Mr. Caughey: That was addressed to Patterson-Ballagh and the other was addressed to Lyon & Lyon.

The Court: You have these here, have you?

Mr. Joseph F. Westall: Yes; here they are. They were offered in evidence and withdrawn and here is a photostat.

The Court: Are you offering them now?

Mr. Westall: Yes, but I haven't read the offer.

The Court: Go ahead.

Mr. Joseph F. Westall: "Mr. Westall: Yes, I suppose they would be photostatic copies, wouldn't they?

"Mr. Caughey: Whatever you wish.

"Mr. Westall: Make them photostatic copies and then we have the stamp and everything on it clearly. We offer in evidence, under the stipulation of counsel, the letter of Carl E. Cameron, dated April 17, 1940, as Moss Deposition Exhibit No. 6."

And we now again offer it in evidence as Plaintiff's Exhibit 6 on the trial.

The Court: Is there any objection to that? [128]

Mr. Caughey: No objection.

The Court: Exhibit 6 is what letter?

Mr. Joseph F. Westall: There are three of them. This is April 17th.

(Deposition of Perry M. Moss.)

The Court: Let me look at it so I will be familiar with it.

The Clerk: Plaintiffs' Exhibit 6 in evidence.

Mr. Joseph F. Westall: "Mr. Caughey: Is that for the purpose of showing notice of infringement?

"Mr. Westall: Yes, and protest, and other reasons to be shown later on in the taking of the deposition. We next offer in evidence as Moss Deposition No. 7 a letter on the letterhead of Lyon and Lyon, dated April 23, 1940, and signed by R. E. Caughey.

"Mr. Caughey: No objection.

> "(The notary marked the document above referred to as Moss Deposition Exhibit No. 7.)"

We now offer that in evidence.

The Court: That will be received.

Mr. Joseph F. Westall: "Mr. Westall: We next offer in evidence the letter heretofore referred to, being the letter from Carl E. Cameron, dated May 10, 1940, to Lyon and Lyon, the original of which has been produced by Mr. Caughey, as Moss Deposition Exhibit No. 8.

"Mr. Caughey: No objection." [129]

The Court: It may be received.

Mr. Joseph F. Westall: Yes; we now offer it as that number in the trial.

The Clerk: Plaintiffs' Exhibit 8 in evidence.

Mr. Joseph F. Westall: "Mr. Caughey: This letter was not written by me, but I recognize the

(Deposition of Perry M. Moss.)

signature and will stipulate it came out of our office and was signed by Richard F. Lyon.

"Mr. Westall: Under the stipulation, we now offer in evidence the letter on the letterhead of Lyon and Lyon, dated June 4, 1940, and signed Lyon and Lyon, as Moss Deposition Exhibit No. 9."

The Court: It may be received.

Mr. Joseph F. Westall: "Mr. Caughey: No objection."

We now offer that in evidence as the deposition exhibit on the trial.

The Clerk: Plaintiffs' Exhibit No. 9 in evidence.

Mr. Joseph F. Westall: "Mr. Westall: Have you read and do you understand the specifications and drawings of Letters Patent No. 2,238,398, granted April 15, 1941, to J. E. Reed, a copy of which I now hand you and which I request that the notary mark for identification as Moss Deposition Exhibit No. 2.

> "(The notary marked the document above referred to as Moss Deposition Exhibit No. 2.) [130]

"A. Yes, I understand the patent in suit."

The Court: Just a moment. Shall we mark this "No. 2"?

Mr. Joseph F. Westall: Yes; we offer that in evidence. Well, it is marked for identification as Moss Exhibit 2 and I haven't offered it yet.

"A. Yes, I understand the patent in suit.

"Q. The Reed Patent? A. Yes.

(Deposition of Perry M. Moss.)

"Q. Did you say you understand the patent in suit? A. Yes.

"Q. Well, this is the Reed Patent. Have you read and understand the Reed Patent?

"A. Yes, I do. I have read and been through it many times. I understand it thoroughly.

"Q. The Reed Patent to which I have just referred? A. Yes.

"Mr. Westall: We offer in evidence as Moss Deposition No. 2 said Reed Patent No. 2,238,398, granted April 15, 1941, as Moss Deposition Exhibit No. 2.

"(The notary marked the document as Moss Deposition Exhibit No. 2.)"

The Court: It may be received.

Mr. Joseph F. Westall: We now offer it as Plaintiffs' Exhibit No. 2 for the purpose of the trial, that is, in evidence on the trial. [131]

* * *

"Q. (By Mr. Westall): Will you please explain briefly the function and intended mode of operation of the device illustrated and described in said Reed Patent 2,238,398?"

The Court: Do you now object to the introduction of the Reed patent?

Mr. Caughey: I don't object to the introduction in view of the subsequent testimony. I wanted to find out why he was putting it in and he said he was putting it in to show what they did. Really, it doesn't make any difference.

(Deposition of Perry M. Moss.)

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 2.

Mr. Joseph F. Westall: "A. It is made of a steel cylinder twenty-eight or thirty inches long, and on the side it has wings welded on, and those wings has a bunch of bolts [132] drilled through, has holes drilled in the wings, with a bunch of bolts to flange it together, and on the side it has bridle hitch means going out to the side of the derrick from the bridle, with a line attached to the bridle, running into the pulley, which end of the line after passing through the pulley goes to the drum on the floor, and is fastened to a weight. It has a hanging line welded in the middle, an eye welded in the middle of the spooler for a hanging line, to hang it in the derrick with.

"Q. Now, you have spoken of wings on the side welded to a cylinder, apparently referring to it as an unsplit cylinder. Why are the wings——

"A. It's a split cylinder to hold it together.

"Q. Do you know whether or not any device like or similar to that illustrated and described in said Reed Patent 2,238,398, Moss Deposition Exhibit No. 2, has been made and distributed?

"A. Yes.

"Q. Please state, if you know, who made such devices like or similar to that of said Reed Patent just referred to?

"A. Patterson-Ballagh Corporation.

"Q. Please state the source of your knowledge that devices like or similar to that disclosed in said

(Deposition of Perry M. Moss.)

Reed Patent 2,238,398 were made and possibly distributed or sold.

"A. By their advertisement and by seeing them in the [133] field.

* * *

"Q. (By Mr. Westall): Well, how did you connect the advertisements to which you referred in your answer with the device of the Reed Patent? How did you know that those devices were made and distributed by the defendant in this case, Patterson-Ballagh Corporation?

"A. From their literature.

"Q. From their advertising?

"A. From their advertising and literature, and seeing them in the field.

"Q. Please state whether or not their advertising showed that device as shown in said Reed Patent under discussion.

"Mr. Caughey: Objected to as not the best evidence.

"Mr. Westall: You can answer the question over the objection."

I think that is the same thing. [134]

Mr. Caughey: Yes.

Mr. Joseph F. Westall: "A. Will you go through it again, please?

"(The reporter read the pending question.)

"A. Yes, by their advertisement and by seeing them in the field.

(Deposition of Perry M. Moss.)

"Q. Were those that you saw in the field marked 'Patterson-Ballagh' in any way?

"A. They had 'Patterson-Ballagh' marked on them.

"Q. On the ones you saw in the field?

"A. Well, what I have seen. Not all of them. The original patents, the first one I seen didn't have anything marked on it. But I have seen them with 'Patterson-Ballagh' on them.

"Q. And when did you see those devices out in the field, particularly those having the name 'Patterson-Ballagh' any place on them?

"A. Well, it was along in 1938, first part of the year.

"Q. Please state, if you know, whether said devices made like or similar to that disclosed in said Reed Patent last referred to were successfully used to perform their intended function.

"Mr. Caughey: That is objected to as calling for a conclusion of the witness; no proper foundation laid."

That is not objected to now, is it, Mr. [135] Caughey?

* * *

February 18, 1948, 10:00 A.M.

(Case called by clerk.)

Mr. Joseph F. Westall: As the court will remember, we were reading the deposition at page 17, line 4, and this question was asked:

(Deposition of Perry M. Moss.)

"Q. Please state, if you know, whether said devices like or similar to that disclosed in said Reed Patent last referred to were successfully used to perform their intended function."

I am asking him to state if he knows whether they were. I know that Mr. Caughey objected to that but there are a number of questions that follow based upon the propriety of that question, and it seems to me that it is not—if he knows, that it is not a conclusion. He is saying something he knows and he shows he does know and why, in the later examination.

Mr. Caughey: May your Honor please, I will not object on the ground that no proper foundation was laid. There is nothing stated as to what "function" means or what this witness knew about the Patterson-Ballagh devices and, obviously, he is just giving his opinion and conclusion. That is all he is doing.

Mr. Joseph F. Westall: No; just simply whether he knows. I think he knows they were not practical and I think we all [137] know it.

Mr. Caughey: That is a mere conclusion.

Mr. Joseph F. Westall: No. Then he proceeds later in the subsequent examination to tell why.

Mr. Caughey: If the later examination is based upon proper facts, that is something else, but I am talking about this specific question.

Mr. Joseph F. Westall: He says they were not successful.

The Court: He used the word "successful" and

(Deposition of Perry M. Moss.)

that calls for an interpretation. If you ask for facts and if he states facts, that evidence is competent but, when you ask a question of that kind, it appears to be a conclusion; I mean in the realm of the use of words that appear to be conclusions.

Mr. Joseph F. Westall: I think those facts are very clearly stated.

The Court: He may give the facts if he wishes, if that is the inquiry. To some extent, that is the province of the court in this particular, is it not?

Mr. Joseph F. Westall: Of course, all of those ultimate questions are for the court, whether it is successful or not.

The Court: To ask a man, who is vitally interested in the matter, who is a litigant, as to whether the other man's invention was successful or not, I think is going out of the realm of fact inquiry. [138]

Mr. Joseph F. Westall: It is evidence so far as it goes.

The Court: If you have any authorities, I would like to hear them.

Mr. Joseph F. Westall: For the sake of the record, subject to the objection, your Honor might modify that later on.

The Court: Yes; if you can give me some more light on the situation so far as the law is concerned. This ruling that I am making now will be made subject to your later motion to renew your question.

Mr. Joseph F. Westall: Yes. Then, proceeding with the reading of the deposition at page 17, line 13:

(Deposition of Perry M. Moss.)

"A. The Reed patent is not made any more."

The Court: Pardon me. This objection takes in what lines?

Mr. Joseph F. Westall: Lines 8 and 9.

The Court: The answer is on line 13, is it?

Mr. Joseph F. Westall: Beginning with line 13. He answers as follows: "The Reed patent is not made any more." He was talking about a foundation is it isn't made.

"Mr. Caughey: That is objected to as calling for a conclusion of the witness; no proper foundation laid.

"Mr. Westall: I have asked him if he knows.

"The Witness: Shall I answer?

"Mr. Westall: Yes." [139]

* * *

"Q. You have stated that devices made and distributed by Patterson-Ballagh in accordance with said Reed Patent, Moss [140] Deposition Exhibit No. 2, were not successful in use. Will you please explain, if you know, why they could not be used successfully?"

That, of course, is laying a little more foundation. This is talking about the actual devices. And then Mr. Caughey, at the top of page 18, says:

"Just a second. Objection is made upon the ground that the question is presupposed upon an answer to which there has been made a motion to strike, and notice is given that if said motion is

(Deposition of Perry M. Moss.)

granted by the court, that all questions based upon said answer will also be moved to be stricken."

He has already explained the Reed patent, what they were making. He does explain it fully and so he knows exactly what he is talking about.

Mr. Caughey: I have no objection to that if he knows what he is talking about, but I want to get some facts to show what he is basing his answer upon.

The Court: Go ahead. There is no objection now. You may proceed.

Mr. Joseph F. Westall: "Mr. Westall: You may answer the question.

"The Witness: Being flanged together and hung from the center, made them out of balance and it was impractical.

"Q. When you say hung from the center, what do you mean? [141]

"A. Well, the spooler was hung from exactly the center of the spooler, the hanging line. The weight of the spooler is on that hanging line at all times and the hanger will be in the center and put it out of balance and cause friction on the top and bottom of your rubbers. It will wear out your rubbers and therefore you get bad results with the hanger being in the middle.

"Q. Please refer to said Reed Patent 2,238,398, Moss Deposition Exhibit No. 2, and point out or indicate by numeral in the patent the hanging line to which you have referred and its attachment to the spooler.

(Deposition of Perry M. Moss.)

"A. The hanging line is right here in the center of your spooler."

The Court: Wait until I look at it.

Mr. Joseph F. Westall: That is shown best in the Figure on the second sheet of drawings, the last Figure.

The Court: All right.

Mr. Joseph F. Westall: "A. The hanging line is right here in the center of your spooler (indicating).

"Q. Indicated by the numeral 28?

"A. That is right.

"Q. And the line apparently is indicated as 29?

"A. That is the hanging line to hang it in the dirt with."

In the deposition it says "in the dirt" but at the end [142] of the deposition the witness corrects that and says that should be "in the girt."

Mr. Caughey: I will so stipulate.

Mr. Joseph F. Westall: "Q. Yes.

"A. And the hanging is attached to the center of this spooler.

"Q. In that lug or whatever it is?

"A. Yes, that eye.

"Q. And extends up and the top end of it is attached to a part of the derrick?

"A. It is attached thirty or forty feet above the spooler.

"Q. Yes. A. To a girt of the derrick."

It says the "crown in the rig" but he corrected that to the "girt of the derrick."

(Deposition of Perry M. Moss.)

Is that stipulated to?

Mr. Caughey: Yes; I will stipulate to it.

Mr. Joseph F. Westall: "Mr. Caughey: Is the witness talking about a patent, or is he talking about the operation? The question, as I recall, was directed to the patent.

"Mr. Westall: I don't think it was.

"Mr. Caughey: Is there anything in the patent which shows any distance or describes any height to which it shall be hung? [143]

"Mr. Westall: Well, whether there is anything in the patent or not, which I don't for the present know without examining it, you know as a matter of fact that the devices made by Patterson-Ballagh under said Reed patent were hung on a hanging line corresponding to the hanging line 29 of the patent and from a loop indicated by the number 28 in Figure 2 of the patent and attached to a part of the derrick as shown in part of the derrick numbered 30, as shown in Figure 1 of the patent?

"A. Yes.

"Q. That is the way they were hanged?

"A. That is the way they was hanging.

"Q. And that hanging and that attachment and hanging you have said was impractical?

"A. Impractical. Put them out of balance.

"Q. And the result of putting it out of balance was what?

"A. Well, you got bad results from your spooler being hung from the center. It put it out of balance. It had no existence to take the whip out of

(Deposition of Perry M. Moss.)

that line because it is teetering like that all of the time.

"Q. And the line you have last referred to is what line? A. Line 29.

"Q. Well, I mean, you have talked about the wear. [144]

"A. The wear, that is the drilling line on the well.

"Q. That would be the line corresponding to the line 12 as shown in Figure 2?

"A. To line 12, yes.

"Q. Do you know to what extent at the present time have devices been made like or similar to that described in said Reed patent and practically used by anyone? A. No.

"Q. I wish you would explain your answer no a little more fully.

"A. No, the Reed patent, you don't see it any more in the field.

"Q. The devices?

"A. The devices of the Reed patent, the devices which the Patterson-Ballagh Corporation are making today, you see them, they are very popular in the field, you see them very frequently. Well, I'll say 75 per cent of the rigs."

That is the ones they are making today, which are under the Moss patent.

Mr. Caughey: That certainly is not in the record and I don't understand that interjection.

Mr. Joseph F. Westall: That is not in the record. I will take it back.

(Deposition of Perry M. Moss.)

The Court: "Seventy-five per cent of the rigs," it says here. [145]

Mr. Joseph F. Westall: Yes; of the rigs.

"Q. I now call your attention to a wooden frame in the office, which I have marked for identification on a shipping tag to it, as Moss Deposition Exhibit No. 3, and ask you whether or not you made or caused to be made such frame? A. I did.

"Q. Please explain why you made or caused to be made such frame marked for identification Moss Deposition Exhibit No. 3 and what it is intended to represent or illustrate.

"A. An oil derrick for demonstrating the line spooler on a drilling well.

"Q. And particularly what line spooler or spoolers? A. The spooler is in the derrick.

"Q. Yes.

"A. This is the drilling line, and this is the line spooler (indicating model)."

That is, that model.

"Q. Well, we will identify those more fully later. And you made that device for use in this case in order to show the operation of these devices—spoolers? A. I did.

"Q. Attached by various cords to Moss Deposition Exhibit No. 3 for identification are certain metal apparatus, which I have marked for identification Moss Deposition Exhibit 4. Please state whether you made or caused to be made such [146] apparatus? A. I did.

(Deposition of Perry M. Moss.)

"Q. What is the apparatus last referred to and marked for identification Moss Deposition Exhibit 4 and what is it intended for?

"A. That is a model of my patented device, intended—it is a line spooler for spooling a line on a drilling well.

"Q. And it is made in accordance with your patent in suit, Moss Deposition Exhibit 1?

"A. Yes.

"Mr. Westall: We now offer in evidence, as Moss Deposition Exhibit 3, the derrick frame which the witness has described and identified, and we also offer in evidence the model of the device of the Moss patent in suit, which, during the taking of these depositions, is suspended in the frame, Moss Deposition Exhibit 3, as Moss Deposition Exhibit 4."

And we now offer both of those in as the same numbered exhibits, 3 and 4, on the trial of this case.

Mr. Caughey: No objection.

The Court: They may be received and marked.

Mr. Caughey: Without admitting, your Honor please, that that is a model which is constructed to scale. I will say that the way that that is suspended in the well isn't the way it is actually set up in the field in a derrick. But, as [147] a model to show the way it is suspended, just generally showing the thing, I have no objection. But when it comes to detail and to scale, then I object. I object that it doesn't show the proper scale.

(Deposition of Perry M. Moss.)

Mr. Joseph F. Westall: In answer to counsel, I will say that scale is no part of the claims in suit and no part of the drawings or dimensions. Those dimensions may be varied to any size and it has nothing whatsoever to do with it.

The Court: You could have this suspended from two blocks, couldn't you?

Mr. Caughey: What I have particularly in mind, for example, the wire line is shown going to the center at the top. As a matter of fact, that is not the way it is done in ordinary operation at all. Furthermore, there is no showing of the drum down here where the drum is, and we would like to have described by somebody, who knows the art of drilling, just where the drum is. Insofar as this is suspended, I have no objection, but, as far as the way it is attached at the top and bottom and other details, I don't agree to it as a proper illustration.

The Court: The only thing involved here is a spooler, is it not, in this litigation?

Mr. Caughey: Oh, no; that isn't all that is involved at all; no, sir, because the claims in and of themselves don't cover a spooler but cover the way it is attached in the derrick. [148]

Mr. Joseph F. Westall: You see, those two pieces up there are slidable and they were just tied for illustrative purposes. They couldn't be made exactly and there was no reason for making them so.

The Court: Those are admitted subjected to the observations made by counsel.

(Deposition of Perry M. Moss.)

Mr. Joseph F. Westall: "Q. Please state whether or not Moss Deposition Exhibit 4 is a correct model of the device as patented by you in the patent in suit, Moss Deposition Exhibit 1.

"Mr. Caughey: That is objected to as not the best evidence, calling for a conclusion of the witness."

It seems to me that he can say it is a correct model, made in accordance with the patent in suit. That is what he testifies. If counsel can show otherwise, he may do it. I don't think it calls for a conclusion of the witness.

Mr. Caughey: I believe, in view of the observations I have made, I should show just exactly what the practice is in the field. And your Honor understands why the objection is made——

The Court: In so far as the model is concerned, of course, the illustration in the patent is the best evidence, isn't it?

Mr. Joseph F. Westall: Yes; the illustration in the patent; and that is simply to show how it was used, for the [149] benefit of the court.

The Court: If that is made in accordance with the illustration——

Mr. Caughey: The illustration of the patent is pretty diagrammatic and doesn't even show a complete derrick in the Moss patent. It doesn't show very much.

Mr. Joseph F. Westall: We don't need it.

The Court: The admission is subject to any

(Deposition of Perry M. Moss.)

corrections in so far as the accuracy of the model is concerned.

Mr. Caughey: That is satisfactory.

Mr. Joseph F. Westall: The witness says, "May I answer?

"A. Mr. Westall: Yes.

"The Witness: Yes.

"Mr. Caughey: Motion is made to strike the answer."

I suppose the motion is withdrawn, is it not?

Mr. Caughey: In view of the statement of the court, yes, sir.

Mr. Joseph F. Westall: "Mr. Westall: In the making of said model, Moss Deposition Exhibit 4, please state whether or not you followed the specifications and drawings of your patent in suit, Moss Deposition Exhibit 1.

"Mr. Caughey: Same objection.

"The Witness: Yes.

"Q. (By Mr. Westall): And the model is, to the best of your [150] ability, in accordance with your patent? A. That is right.

"Mr. Caughey: Same objection.

"Q. (By Mr. Westall): Please state how the apparatus, Moss Deposition Exhibit 4, also referring when necessary to the wooden model derrick frame, Moss Deposition Exhibit 3, operates to perform its function?

"A. How the spooler is made and how it operates?

"Q. Yes.

(Deposition of Perry M. Moss.)

"A. My spooler is a piece of four-inch pipe——

"Q. I am talking about the model.

"A. Oh, the model. The model is installed on the line as it is here.

"Q. As it now hangs in the derrick?

"A. Yes, and this is your hanging line.

"Q. Now, the one that you indicate as the hanging line is a line attached to—where is it attached?

"A. To the side of the derrick on the girt. This is your hanging line.

"Q. And where is the lower end attached?

"A. Attached to the top of the spooler, and the weight of that spooler is on that (indicating).

"Q. To a lug with a hole in it at one side near the top of the spooler, is that right?

"A. That is right. [151]

"Q. Please describe the line which is spooled. Please identify it and describe how it is used.

"A. How the spooler is used?

"Q. I mean how the line——

"A. Your drilling line pulls your pipe in and out, runs through that spooler at a very high speed and has a lot of waves in it above the spooler.

"Q. Vibrates? A. Vibrates.

"Mr. Caughey: That is objected to on the ground that it has nothing to do with the model. The question is directed to the model. You are talking about commercial operations now.

"Mr. Westall: Yes, I am asking how it is operated."

The Court: Is there an objection to that?

(Deposition of Perry M. Moss.)

Mr. Caughey: I just made the objection so they would get back on the model.

The Court: Then, there is no objection?

Mr. Caughey: There is nothing of importance, your Honor.

Mr. Joseph F. Westall: "A. And as that line passes through and with those waves in it, this takes the waves out of your line as it passes through the spooler and causes it to spool correctly on the drum.

"Q. And what are those rubber inserts that are shown at the top and bottom of the spooler?

"A. That is the rubber inserts your line runs through [152] with a little clearance on your line, to be replaced as they wear out."

The Court: Pardon me just a moment. Where is the drum?

Mr. Joseph F. Westall: This is the drum down here.

The Court: Is there a replica of the drum spoken of here?

Mr. Joseph F. Westall: No. You see, they only use this for illustrative purposes. It will be understood it will be like the patent in suit.

Mr. Caughey: If your Honor please, if you will refer to the Reed patent, and to Figure 1——

The Court: There is also an illustration of a drum in the Moss patent?

Mr. Caughey: Yes; in Figure 2.

Mr. Joseph F. Westall: Figures 1 and 2.

The Court: That merely illustrates where the drum is located and not as to its dimensions?

(Deposition of Perry M. Moss.)

Mr. Joseph F. Westall: No; not as to its construction, which is not involved in this case.

"Q. In the model you find a line—" well, I think I didn't read this question and answer.

"Q. And what are those rubber inserts that are shown at the top and bottom of the spooler?

"A. That is the rubber inserts your line runs through with a little clearance on your line, to be replaced as they [153] wear out.

"Q. In the model you find a line which is indicated as line 2 of the patent in suit, passing through the inserts of the spooler, attached to a cylindrical crossbar at the bottom of the derrick. What is that crossbar intended to illustrate?

"A. That's a drum that the line spools on, on the drilling well.

"Q. The drum spooling cylinder?

"A. That is right.

"Q. The spooling drum? A. Yes.

"Q. And in spooling, the line wraps around that as it is spooled? A. Yes.

"Q. Starting at one end and then going back and forth?

"A. Back and forth; that is right, sir.

"Q. No matter how long it is?

"A. That is right, until you get your stand out, which is 85 or 90 feet.

"Q. Now, *stilling* referring to said line 2, to the drilling line, where does it go from the top of the spooler when it leaves the insert at the top of the spooler? Where does it go then?

(Deposition of Perry M. Moss.)

"A. The drilling line goes over the top of the derrick, [154] over the crown block.

"Q. Please describe the crown block and just what it goes over.

"A. The crown block is a series of crossing members of steel; it has pulleys on there, at the top of the derrick. They call it a crown block, and these lines are strung up on there, six or eight, or ten, or whatever is suitable for your blocks.

"Q. And those blocks are what—what does it go over?

"A. It goes over a steel pulley, each line does.

"Q. On the crown block?

"A. On the crown block.

"Q. And from there where does it go?

"A. It is attached to your traveling block, to pull your drill pipe in the hole and out of the hole, or make connections as they see fit to use it.

"Q. And it is made when unspooled to go as deep in the well as is desired?

"A. That is right.

"Q. To allow things to be lowered into the well and to be pulled out of the wall, is that right?

"A. That is correct.

"Q. Please state whether or not defendant, without your consent and over your protest, has manufactured and continued to manufacture and sell devices similar to that described [155] in said patent in suit No. 2,190,880, Moss Deposition Exhibit 1? A. Yes.

"Mr. Caughey: That is objected to as calling for

(Deposition of Perry M. Moss.)

a conclusion of the witness, and also not the best evidence, and also calling for the opinion of the witness without a proper foundation being laid."

Mr. Caughey: It certainly is not a proper question.

Mr. Joseph F. Westall: It is the function of the court to determine infringement. That ultimate question is for the court to consider. But you have to have evidence——

Mr. Caughey: It isn't merely evidence to ask a man whether there is an infringement.

Mr. Joseph F. Westall: We say it would be infringement when we say that the ultimate question of infringement is for the court.

The Court: That might go to the question of laches also.

Mr. Caughey: Oh, yes.

The Court: I think that answer may stand.

Mr. Joseph F. Westall: At the bottom of page 27:

"Q. (By Mr. Westall): Will you please state how you know that defendant has continued to manufacture and sell devices similar to that described in your patent in suit, Moss Deposition Exhibit 1? [156]

"Mr. Caughey: Same objection.

"The Witness: By their advertisements and by seeing them in the field.

"Q. (By Mr. Westall): And did you see any marking on them which would indicate that they came from Patterson-Ballagh on those?

(Deposition of Perry M. Moss.)

"A. I have seen 'Patterson-Ballagh' marked on them.

"Mr. Caughey: That is objected to as not the best evidence, and motion is made to strike it."

Is that objection insisted upon?

The Court: That objection may be overruled. That is a matter for cross-examination to see what he knows about that particular matter.

Mr. Joseph F. Westall: "Mr. Westall: Q. Please state, if you know, when defendant began to manufacture and sell such devices like and similar to that disclosed in your patent in suit, Moss Deposition Exhibit 1?

"Mr. Caughey: Same objection."

The Court: That objection is overruled.

Mr. Joseph F. Westall: "The Witness: In October, 1937.

Q. (By Mr. Westall): ——"

The Court: Pardon me just a moment. Is there any contention that the device that was manufactured by the defendant was not sold?

Mr. Caughey: No. Mr. Ballagh stated that on the witness [157] stand.

Mr. Joseph F. Westall: Mr. Ballagh didn't state that these that were made prior to the grant of the patent were manufactured but he said since the patent.

Mr. Caughey: Mr. Ballagh testified that all of the devices shown in the advertisements which you showed to him were manufactured and sold by the Patterson-Ballagh Corporation; that that corpora-

(Deposition of Perry M. Moss.)

tion was in existence at the time that the advertisements were put out. You asked him that question.

Mr. Joseph F. Westall: Yes. And you stipulated that those advertisements and literature were after the grant of the patent.

Mr. Caughey: I beg your pardon. They started in October, 1937.

Mr. Joseph F. Westall: Yes; I think that is so. Yes; you are right.

The next is on line 17, where the witness says:

"In October, 1937," and counsel says that is stipulated.

Mr. Caughey: I didn't stipulate. I said Mr. Ballagh testified on the stand that the devices were made and sold as shown in the advertisements.

Mr. Joseph F. Westall: Yes; that is right.

The Court: That covers the objection and that is the stipulation now? [158]

Mr. Joseph F. Westall: Yes.

"Q. (By Mr. Westall): Please state whether or not, if you know, the defendant herein is still continuing to manufacture and sell such devices as illustrated in your said patent in suit.

"Mr. Caughey: Same objection.

"The Witness: Yes."

I guess that objection is not urged here.

Mr. Caughey: My objection was to the point that the questions were tied up with the patent in suit, and it says as shown in the patent in suit. And my objection was that Patterson-Ballagh manufacture and sell devices but they don't do any installing

(Deposition of Perry M. Moss.)

of them in the field. That is done by the operator.

Mr. Joseph F. Westall: We are talking about the devices of the patent.

Mr. Caughey: That is correct.

Mr. Joseph F. Westall: You manufacture and sell these devices to be put in derricks.

Mr. Caughey: That may be so but the devices shown in the patent show a hanging line suspended in the derrick. I will grant you Patterson-Ballagh sell devices with at hanging line on it but they don't actually use the devices.

The Court: Don't you have the evidence here of just exactly what was sold and [159] manufactured?

Mr. Caughey: Yes, sir.

The Court: Is there any need to go into particulars on that score? You have a description——

Mr. Joseph F. Westall: We will have an illustration of what they made at periods.

Mr. Caughey: We raise no question about that. We just are merely making the objection of tying it up by saying "as illustrated in your said patent." If they specifically asked if Patterson-Ballagh manufactured such and such, I would have no objection, but when they ask the question "as illustrated in your patent," which means your Honor is to go to the patent to find what it is, then I raise an objection and the reason for the objection I have stated to your Honor.

Mr. Joseph F. Westall: Anyway, the witness

(Deposition of Perry M. Moss.)

says he knows what is illustrated and he explained it and I think that is evident.

The Court: Let me read this just a moment. Of course, that won't give me any information, "similar devices." I can't get any facts out of that particular answer.

Mr. Joseph F. Westall: The devices as illustrated in the patent in suit. All we have to do is look at the patent in suit to find out what those devices are.

The Court: But what is the witness talking about? What is he identifying when he says he knows similar devices are [160] being sold?

Mr. Joseph F. Westall: He is identifying the whole thing.

Mr. Caughey: Is he including the way they are hung in the well?

Mr. Joseph F. Westall: Yes; and that is the way you in your advertising literature tell your people to hang them.

Mr. Caughey: That may be so but that isn't the question and that is one of the reasons I made the objection. The way the question is framed, it doesn't mean anything.

Mr. Joseph F. Westall: He refers to the patent, as illustrated in the patent, he says; that they are making those things just as illustrated in the patent.

The Court: If your stipulation has any value, what has been sold and manufactured is exactly what is illustrated in the documents that you have referred to and the advertisements?

(Deposition of Perry M. Moss.)

Mr. Joseph F. Westall: Yes; that is what it is.

The Court: And is that what you refer to in this question?

Mr. Joseph F. Westall: Exactly and precisely.

The Court: And that is your answer that you base the factual situation on, as embodied in the answer, as referring to the advertisements of the device sold and manufactured, is that correct? [161]

Mr. Joseph F. Westall: The advertisements will be introduced after but we are just referring now to the patent. He says he knows what is in the patent and that they are making those devices just like that. That is all he answers.

Mr. Caughey: May your Honor please, the issue in this case is not whether a line spooler was made like that line spooler, because line spoolers, as we will show, were made like that before. The question is whether or not the defendants hung a line spooler from the top to cause it to perform the function that the patent specifies and, if they did that, whether or not they infringed or whether the patent is valid. There is nothing in the question that has anything to do with the way it is hung or the angle that is assumed by the spooler or anything like that.

The Court: That is another element, is it not?

Mr. Caughey: Yes, sir; and that is the reason I am raising the objection, because we manufactured and sold certain structures, and we will agree that they were manufactured and sold in accordance with our advertisements; we will admit that. But

(Deposition of Perry M. Moss.)

we do not go so far as to say and we don't believe that Mr. Westall had a right to frame his question so that it would be a mere conclusion that what we sold was exactly as illustrated in the patent and so functioning and hung.

Mr. Joseph F. Westall: Anyway, that is the question and we will have evidence on that. He is simply asked whether [162] they have devices as illustrated in the patent, and he says, positively, "Yes; we did," and that is what we contend.

The Court: There is no question about that, is there, about these devices? You have them illustrated and you have them set out in the patent.

Mr. Caughey: There isn't any question of the devices themselves.

The Court: That is what you are talking about, is it not?

Mr. Joseph F. Westall: Yes.

Mr. Caughey: If you will agree that is the device and not the way it is hung in the well——

Mr. Joseph F. Westall: The device is illustrated in the patent and it shows how it hangs and he is stating that it is made and used and hung as illustrated in his patent and sold for that use by Patterson-Ballagh Corporation. Of course, they can't build a derrick or they don't drill a well but they sell it to purchasers for use. So I don't see how I could make the question more specific.

Mr. Caughey: It certainly could be made more specific if it was brought down to a structure. I think the court can understand that is the trouble

(Deposition of Perry M. Moss.)

with the question and that it merely calls for a conclusion.

Mr. Joseph F. Westall: It says "as illustrated in your patent," and he says, "Yes; they did." I think, however, that [163] would be a minor detail when we get along because you will see later on that there can't be any question about this.

The Court: I haven't read the rest of the answer but he stated in the previous answer that he knows that similar devices were sold. And now you are asking him to state the source of his knowledge?

Mr. Joseph F. Westall: Yes; that is the next question and he answers that yes.

The Court: I think the facts as later developed may throw some light on that. I don't think that answer, in itself, is going to help the court. That objection will be overruled.

Mr. Joseph F. Westall: At the top of page 29, the next thing is I made a remark, "The source of his knowledge." And Mr. Caughey says, "Notice is called to the fact that counsel for the plaintiff is predicating his questions upon the assumption that there is actual infringement without there being any evidence in the record to support the same.

"Mr. Westall: Well, the final question of infringement is for the court after interpretation of the claim.

"Mr. Caughey: That is just what I am getting at.

"Mr. Westall: We can only at the present time

(Deposition of Perry M. Moss.)

do one thing at a time, and that is to prove the nature of the apparatus and also the actual knowledge possessed by the defendant of those devices made like the patent which we contend [164] infringe his claims."

Right here, stopping reading for a minute, I want to say we called this witness, who was there contrary to the doctor's orders, and we had Mr. Ballagh in the room but we postponed Mr. Ballagh because this witness was under a terrible strain. He had been propped up in bed.

Mr. Caughey: I appreciate Mr. Moss was a sick man but I don't think there should be any such remarks in this record. As a matter of fact, on the examination I endeavored to be as courteous to him as I could. But why there should be any such remarks made here, I don't understand.

Mr. Joseph F. Westall: I am just explaining——

The Court: I can't follow you because he is a litigant here and, sick or well, he has brought this litigation. And it is not an issue here. I can't see the relevancy of it unless you have something in mind.

Mr. Joseph F. Westall: This is just preliminary. There is plenty of evidence, which will be constantly going in, showing all of these things, showing that they were making it exactly like the Moss patent.

The Court: Let's go ahead.

Mr. Joseph F. Westall: Then, Mr. Caughey says, "All right, then, why don't you do that instead of

(Deposition of Perry M. Moss.)

asking the witness to arrive at certain conclusions? Why don't you bring out what we are doing, so we can see what you are talking [165] about?

"Mr. Westall: Well, before we get through, we will.

"Mr. Caughey: It seems to me it is proper to do it now before you ask such questions.

"The Witness: Yes, they are making it.

"Mr. Westall: Read the question, Mr. Reporter."

He was asked the source of knowledge, and the witness said, "By their advertisement and seeing them in the field.

"Mr. Caughey: Same objection as to the previous questions, and motion is made to strike the answer."

Your Honor, he saw them in the field and knew their advertisements and afterwards we put the advertising in.

The Court: If what he saw corresponds to what was adduced as shown by your illustrations, then I will know that that is the device that he has seen in the field.

Mr. Caughey: That is true; he may have seen the device in the field, sold by Patterson-Ballagh, but that has nothing to do with the way in which the thing may be hung in the well.

The Court: Isn't that developed later on?

Mr. Caughey: Yes.

Mr. Joseph F. Westall: Yes.

The Court: If it is developed later on, on cross-

(Deposition of Perry M. Moss.)

examination, and will be followed up, then we will know what happens. I will rule on that if you want a ruling. Do you want a ruling? [166]

* * *

Mr. Joseph F. Westall: "Q. (By Mr. Westall): I place before you certain advertisements which I have marked for identification Moss Deposition Exhibits 10-A, including intervening letters, to 10N (handing papers to Mr. Caughey and then to the witness, and a pause), and ask you if those are some of the advertisements to which you referred as a source of knowledge concerning the character of the line spooler that the defendant in this case has been making and offering for sale and selling."

Mr. Caughey: May your Honor please, in view of the fact that these advertisements are in and they cover from pages 30 to 38 and that they merely identify the advertisements and they are already in, I seen no reason for reading that, and I would stipulate that it may be read and copied in the record or deleted, because the advertisements are in by stipulation.

The Clerk: They have not yet been offered in evidence.

Mr. Caughey: Then, offer them and that will take care of it. It just takes up considerable time which I think is unnecessary.

Mr. Joseph F. Westall: Then, we offer the exhibits, heretofore identified as Moss Exhibits 10A to 10N, as Moss Exhibits [167] on the trial in evidence, Plaintiffs' Exhibits 10A to 10N.

(Deposition of Perry M. Moss.)

The Clerk: Is it stipulated that the one marked with the letter "E" should be trial exhibit "10E"?

Mr. Caughey: Yes; so stipulated.

Mr. Joseph F. Westall: Yes; that has been stipulated.

The Court: That may be received. This is beginning with page 30——

Mr. Caughey: To the top of page 38.

Mr. Joseph F. Westall: You see, in this deposition the pages of the catalogs and one thing and another are identified and I think it would be better to read the deposition in order to have that in.

The Court: I think you may go ahead and read that because I notice there are some objections and discussion there.

Mr. Caughey: I will withdraw the objections in view of the fact I had the opportunity of going over subsequently all of the advertisements. At the time I made the objections, I didn't know because I hadn't seen the advertisements before.

Mr. Joseph F. Westall: It is true, too, that Mr. Ballagh later did admit they were the advertisements.

Mr. Caughey: That is correct.

Mr. Joseph F. Westall: That is one thing that obviated [168] your objections.

Mr. Caughey: Yes.

Mr. Joseph F. Westall: I notice at the bottom of page 33 where there was a suggestion, and I said, "Well, we must have them in evidence, and I believe that sufficient foundation has been, and fur-

(Deposition of Perry M. Moss.)

ther foundation will be made as you suggested, during Mr. Ballagh's examination."

The Court: I would like to have you read that so I can consider the objections between pages 30 and 38. Whatever the fact is, I would like to have you read it.

Mr. Joseph F. Westall: Yes. Then, I will go on from there and read, beginning with line 8, to the end of that question, referring to his source of knowledge, which he answered. He says, "A. Yes; that's them.

"Q. Those are the advertisements, are they?

"A. Yes, those are the advertisements.

"Mr. Caughey: Counsel for defendant has no objection to the use of those photostats in the series from 10A to 10N, inclusive, when and if they are offered in connection with the taking of the deposition, subject, of course, to the question whether they are material and sufficiently proved.

"Mr. Westall: We offer in evidence, as Moss Deposition Exhibit 10A, a purported advertisement of Patterson-Ballagh, comprising pages numbered, in pencil, 1, 2 and 3, on each of the pages, showing a part of a derrick with a line spooler [169] installed therein.

> "(The notary marked the document Moss Deposition Exhibit 10A.)"

The Court: May I see those that are offered?

Mr. Joseph F. Westall: Mr. Caughey says, in line 10, "Is that the advertisement I sent you?

(Deposition of Perry M. Moss.)

"Mr. Westall: You sent us.

"Mr. Caughey: Insofar as that particular advertisement is concerned, we will stipulate that is an advertisement of the Patterson-Ballagh Corporation, that is, a photostatic copy of an advertisement.

"Mr. Westall: That is, you are talking about Moss Deposition Exhibit 10A, is that correct?

"Mr. Caughey: Yes.

"Mr. Westall: We also offer in evidence, as Moss Deposition Exhibit 10B, a purported leaflet or advertisement, rather, which is noted at the bottom to have been of June 3, 1944, in the Oil and Gas Journal and entitled at the heading 'How to Control a Traveling Wave.'

"(The notary marked the document Moss Deposition Exhibit 10B.)

"Mr. Caughey: If you are offering it, Mr. Westall, as advertisements that the witness saw, we have no objection. If you are offering it as advertisements of Patterson-Ballagh, objection is made on the ground that it is not sufficiently [170] proven. Mr. Ballagh is here and I presume you will put him on the witness stand and, if he will have an opportunity of going over them and you will ask him the proper questions, in all probability we can determine at that time whether they are advertisements of Patterson-Ballagh. But I believe that at this time it is not in order to offer them as advertisements of Patterson-Ballagh without sufficient proof.

(Deposition of Perry M. Moss.)

"Mr. Westall: When Mr. Ballagh takes the stand, we will follow counsel's kindly suggestion, but we believe that there has been a sufficient foundation as to the source of this witness' knowledge for the present offer, which we are making under the stipulation of counsel.

"Mr. Caughey: Well, if you are making the offer, as I said, to show those are the advertisements he relies upon, I have no objection.

"Mr. Westall: Well, of course, we are showing that we are——

"Mr. Caughey: But, if you are putting them in for any other additional purposes or showing that they are advertisements of Patterson-Ballagh at the present time——

"Mr. Westall: We are showing that they were advertisements of Patterson-Ballagh at the time of their respective dates, which is shown on most of them, I believe, and, as we say, we are showing that these advertisements were seen by the witness and they are the basis of his statement that he [171] knew they were advertising and offering for sale line spoolers such as described.

"Mr. Caughey: That was not the testimony of the witness. The witness testified they were manufacturing and selling spoolers such as shown in the advertisements and that he knew that by the advertising.

"The Witness: And by seeing them in the field.

"Mr. Westall: And also by seeing them in the field. They must have been sold.

(Deposition of Perry M. Moss.)

"Mr. Caughey: We are talking about the advertisements at present. As I previously stated, if they are being offered solely to support the testimony of the witness that that is what he was relying on, the advertisements in part, to show that Patterson-Ballagh was manufacturing and selling the devices shown in the advertising, I have no objection. But I believe the other introduction is out of order at the present time, that is, that they were actually advertisements of Patterson-Ballagh. Same objection. Why don't you put them in for identification?

"Mr. Westall: Well, we must have them in evidence, and I believe that sufficient foundation has been and further foundation will be made as you suggested, during Mr. Ballagh's examination."

The Court: We will take a five-minute recess.

(Short recess.) [172]

Mr. Joseph F. Westall: I believe that the last exhibit we were talking about was B and I understand from the clerk that all of these exhibits, 10A to 10N have been marked in evidence under a blanket offer.

The Court: Yes.

Mr. Joseph F. Westall: We take up, next, at the top of page 34, line 3.

"Mr. Westall: We now offer in evidence, as Moss Deposition Exhibit 10C, an original copy of The Oil Weekly, dated June 25, 1943, and particularly page 66 thereof, showing a purported adver-

(Deposition of Perry M. Moss.)

tisement of Patterson-Ballagh of the apparatus in question in this litigation.

"Mr. Caughey: Same objection."

And that has already been offered in evidence.

"Mr. Westall: We next offer in evidence, as Moss Deposition Exhibit 10D, an original copy of The Oil Weekly, dated February 19, 1945, and particularly to page 49 thereof."

And that is also in evidence.

"Mr. Westall: We next offer in evidence what purports to be a brown paper-covered pamphlet labeled on the outside cover 'Patterson-Ballagh Oil Well Specialities,' but which so far as I have been able to find does not bear a date, and particularly pages 1948 and 1949 of said catalog, as Moss Deposition Exhibit 10E," which is in evidence as 10E on the trial.

At the bottom of page 34, there is an objection but [173] counsel has withdrawn his objections and I don't need to read it. Beginning at the top of page 35:

"Mr. Westall: We next offer in evidence a blue-back mottled pamphlet labeled on the back, in red, 'Patterson-Ballagh' and, in white, on a black background, 'Oil Well Specialties,' and apparently a catalog of specialties of the defendant corporation, and particularly pages 1936 and 1937 thereof, as Moss Deposition Exhibit 10F."

That also has been put in evidence.

"Mr. Westall: We next offer in evidence, as Moss Deposition Exhibit 10G, a copy of The Oil

(Deposition of Perry M. Moss.)

Weekly, dated June 24, 1946, and particularly page 66 thereof."

Page 35, line 16:

"Mr. Westall: We next offer in evidence, as Moss Deposition Exhibit 10H, a black, white-lettered photostat, labeled at the bottom 'Patterson-Ballagh Oil Specialties,' dated April 25, 1940, and purporting to be page 20 of The Oil and Gas Journal."

At the bottom of page 35, line 26:

"Mr. Westall: We next offer in evidence as Moss Deposition Exhibit 10I a photostatic copy of The Oil and Gas Journal, page 186, which has written at the bottom of it, 'December 30, 1937.' "

Page 36, line 7:

"Mr. Westall: We next offer in evidence, as Moss Deposition [174] Exhibit 10J, a black, white-lettered photostat with the name and address of Patterson-Ballagh Corporation, being page 40 of The Oil and Gas Journal, or so marked," and the date of that Journal is November 18, 1938.

Page 36, line 14:

"Mr. Westall: We next offer in evidence, as Moss Deposition Exhibit 10K, a white photostat, black-lettered, marked at the bottom 'Patterson-Ballagh Corporation,' with its address, and marked also page 40 of The Oil and Gas Journal, and also having a notation, apparently in pen, 'December 18, 1938.' "

The Court: This one I have here says, November 18, 1938."

(Deposition of Perry M. Moss.)

Mr. Joseph F. Westall: Exhibit 10J.

The Clerk: That is 10K.

Mr. Joseph F. Westall: What is the date on there? What does it say?

The Clerk: November 18, 1938.

Mr. Joseph F. Westall: Yes; I have got the wrong number here.

Mr. Caughey: I will stipulate it is November 18, 1938.

Mr. Joseph F. Westall: At page 36, line 23, "Mr. Westall. We next offer in evidence a white photostat, having a caption at the top of the first column, 'Drilling 10th Well Without Replacement,' with a picture of an oil line [175] spooler, and at the bottom of that column containing the words 'Patterson-Ballagh Wire Line Guides, Patterson-Ballagh Corp.,' and giving the address, and being page 74 of The Oil and Gas Journal, the top of the second two columns on the page being headed 'December Crude Estimate Is Lower Than a Year Ago,' as Moss Deposition Exhibit 10L," which is in evidence.

Then, at page 37, line 10:

"Mr. Westall: We next offer in evidence a white photostat, with black letters and illustrations, being page 100 of The Oil and Gas Journal, the heading of the page being 'How to Control Traveling Wave,' and having the date June 3, 1944, written at the bottom, as Moss Deposition Exhibit 10M."

On page 37, line 19:

"Mr. Westall: We next offer in evidence a green mottled black paper-covered catalog labeled on the

(Deposition of Perry M. Moss.)

back, in red, 'Patterson-Ballagh' on a black background and between the two names, in white, 'Oil Well Specialties,' and in white, on a black background, at the bottom of the cover, the words, '1947 —"Best Bet Yet" for Twenty Years,' and particularly pages 3081 and 3082 thereof, apparently not dated, as Moss Deposition Exhibit 10N," which I understand is in evidence.

And that is the end of the offers of those exhibits. At the top of page 38:

"Q. (By Mr. Westall): When did you first conceive of the [176] invention of your patent in suit, 2,190,880? A. May, 1936.

"Q. When did you first disclose the invention of said patent to anyone? A. May 16, 1936.

"Q. To whom did you first disclose the invention of your said patent?

"A. To Mr. A. M. Anderson, superintendent of Holly Oil Company, Huntington Beach, and Mr. William Phillips of Garden Grove.

"Q. After your first disclosure as above related to others of your said invention as finally covered in the Letters Patent in suit, Moss Deposition Exhibit 1, when did you make any other disclosure to anyone?

"A. November 23, 1936, to Perry Terry of Huntington Beach.

"Q. When did you place the matter of preparing your application for your patent 2,190,880, Moss Deposition Exhibit 1, in suit, in the hands of your attorney, Mr. Cameron?

(Deposition of Perry M. Moss.)

"A. I placed my case in the hands of Mr. Cameron along the first of March, 1940.

"Q. In the hands of Cameron?

"A. Yes, sir.

"Q. The matter of preparing the application?

"A. Oh, preparing the application, I see. [177]

"Q. In the hands of your attorney.

"A. It was January 3, 1938.

"Q. And what was the name of the attorney?

"A. Mr. Maynard.

"Q. Has the device of your patent in suit 2,190,-880 been successful in operation? Did it perform its intended function? A. Yes.

"Mr. Caughey: That is objected to as calling for a conclusion and opinion of the witness."

Does counsel insist on that?

Mr. Caughey: I certainly do. There isn't any question about that in my mind.

Mr. Joseph F. Westall: His intended function of the device is fully stated in the patent and he says it did perform this function of its design.

Mr. Caughey: I don't think that would help the court.

Mr. Joseph F. Westall: I think it would.

The Court: That is his opinion, for what it is worth. Overruled.

Mr. Joseph F. Westall: Page 39, line 14:

"Q. (By Mr. Westall): Referring to your patent in suit 2,190,880, Moss Deposition Exhibit 1, and to the weights indicated in Figures 1 and 2 of the drawings of said patent marked 21, please

(Deposition of Perry M. Moss.)

state whether or not it makes any difference [178] in the operation of the device whether said weights 21 are above the derrick floor or below the derrick floor.

"A. It doesn't make a bit of difference.

"Q. Referring to the hanging line 14 of the drawing of your patent in suit, Moss Deposition Exhibit 1, please state how long, approximately, that line will be.

"A. Forty-five feet.

"Mr. Caughey: Just a second, please. Is the witness talking about what is shown in the patent or what he states should be the commercial operation?

"Mr. Westall: He is talking about the actual commercial use of it."

At the top of page 40:

"Q. Could that line be as short as 30 feet and still properly perform its stated function in your said patent in suit? A. Yes.

"Mr. Caughey: That is objected to on the ground that there is no definition of 'function.' "

The function is stated in the patent.

Mr. Caughey: In view of your Honor's previous ruling, I will withdraw that.

The Court: Very well.

Mr. Joseph F. Westall: Then Mr. Caughey says, "I don't know what you are talking about. [179]

"Mr. Westall: We are talking about the line 14 of the patent in suit.

(Deposition of Perry M. Moss.)

"Mr. Caughey: Well, it functions as a line, I will admit, if that is what you mean.

"Mr. Westall: The hanging line we are talking about, does hanging line 14 of your patent in suit perform any function in the initial installation of the device and, if so, what function?

"A. Yes. My patented device has an eye welded on top, one end of that hanging line attached on the floor by the crew. It is pulled up in place with the cat line and the other end of that hanging line is attached 30 or 40 feet above the drum over the center above the spooler, over the center of the drum, and the cat line is removed and the weight of the spooler is on that hanging line at all times."

Page 41:

"Q. Is it true that the weight of the wire line guide in the device of Reed Patent 2,238,398, Moss Deposition Exhibit 2, is only on a hanging line at initial installation?

"A. No. It's installed the same as mine. That hanging line is tied in the center of the spooler on the floor, the way the majority of the crews put it up. One end of that hanging line, on the Reed patent, is attached to the center of the spooler. The spooler is placed with the cat line and the other end of that hanging line is attached to the [180] side of the derrick 30 or 40 feet above the spooler over the center of the drum, and then the cat line is removed and the weight of that spooler is on that hanging line at all times.

"Q. Is it true that the only occasion on which

(Deposition of Perry M. Moss.)

the weight would be suspended on the hanging line, to which you have just referred, would be when the weight of the wire line guide exceeds the weight of the counter weights?

"Mr. Caughey: May I have that question, please?

"The Witness: The weight's on that hanging line at all times.

"Q. (By Mr. Westall): Is it true that the weight of the wire line guide in the device of your patent in suit and in the device of the Reed Patent 2,238,398 is approximately 84 pounds?

"A. Mine weigh a hundred pounds.

"Mr. Caughey: Mr. Westall, I have made no objection to date but all these questions you are asking are leading questions. The witness has testified he is fairly familiar with this art, and I don't see any necessity for asking leading questions on this examination.

"Q. (By Mr. Westall): Please state, if you know, whether or not the weight of the wire line guide in either of said constructions at any time approximates a hundred pounds.

"A. Yes, mine weigh a hundred pounds.

"Q. You have already said that. [181]

"A. Yes.

"Q. And the other one you don't know?

"A. I don't know what it weighs.

"Q. Does line 14 of your patent in suit, the hanging line, or lines 29 and 29 prime of a similar line of said Reed Patent 2,238,398, Moss Deposition Exhibit 2, perform any function of a safety line?

(Deposition of Perry M. Moss.)

"A. No, sir. The safety line is slack at all times. It is used for a safety line and a hold-down line. In case this hanging line breaks, it will catch it. The weight of your spooler is on this hanging line at all times.

"Q. You have spoken of a safety line. Where is the safety line which you have?

"A. This used as hold-down line (indicating). It is slack at all times." The hold-down line is this line. "It is slack at all times, in case this hanging line breaks.

"Q. The line you refer to is attached to the side of the derrick and is slack and the other end is attached to—— A. This spooler.

"Q. The lower part of the spooler?

"A. That is right.

"Q. That is the safety line?

"A. That is the safety line. It is slack at all times. They call it a safety line and a hold-down line. It answers for both. [182]

"Q. Is it practical at any time to have the hanging line slack when it is in use?

"A. No, the spooler wouldn't function properly.

"Q. How soon after the discovering what you contend to be infringement in this case did you place the matter in the hands of Cameron for notification or protest?

"A. How soon after I got my patent?

"Q. How soon after discovering the infringement of your patent, after your patent was granted, of course?

(Deposition of Perry M. Moss.)

"A. Well, I turned my case over to attorney Cameron around the first of March, 1940. Do you want the notification when he notified him, he notified Patterson-Ballagh Corporation?

"Q. Yes, we have that in the evidence.

"A. Yes. Along in 1942 Mr. Cameron got killed in an automobile accident.

"Mr. Westall: You may cross-examine.

"Cross-Examination

"By Mr. Caughey:

"Q. I believe you testified to some date of April 5, 1937, Mr. Moss. Was that the date upon which you actually constructed one of these devices?

"A. October——

"Q. April 5, 1937, you gave that date.

"A. Yes, that is when I actually put up one on a rig. [183]

"Q. Is that the first time you ever did put one up on a rig?

"A. Yes, that was my first one—April 5, 1937.

"Q. You also testified to manufacturing a device, making one, I believe in December of 1936, or maybe it was the latter part of November, is that correct?

"A. I didn't make any then. I talked—I conceived the idea of working on a rig—having it on the floor, having so much trouble with the line—I conceived the idea of a line spooler, and that is when I told Mr. Art Anderson about the spooler on that date.

(Deposition of Perry M. Moss.)

"Q. On November 23, 1936?

"A. No, that is when Mr. Terry—no, I told Mr. Anderson the 16th of November, 1936. Mr. Terry, Huntington Beach, the 23rd of November, 1936.

"Q. And you are relying on your recollection as to those dates, are you, Mr. Moss?

"A. Yes, I am.

"Q. Have you any other evidence to support it except your recollection?

"A. I have other witnesses.

"Q. I mean, you——

"A. Do I have any more?

"Q. Yes, any documentary evidence or anything to support the disclosure to these gentlemen as of the dates indicated, [184] except your recollection.

"A. I have their sworn statement.

"Q. You have their sworn statement?

"A. Yes.

"Q. Was that sworn statement made at the time you made the disclosure? A. No.

"Q. Have you got that sworn statement available?

"A. Mr. Caughey has Mr. Anderson's sworn statement.

"Q. You mean Mr. Westall has?

"A. Mr. Westall has. He should. He had it in his records. Haven't you got that sworn statement of Mr. A. M. Anderson?

"Mr. Westall: Yes, those witnesses will be called later.

"Q. (By Mr. Caughey): I am inquiring now

(Deposition of Perry M. Moss.)

as to whether or not at the time you made the disclosure they signed anything to the effect that you had disclosed this invention to them.

"A. No, they didn't sign anything. I just merely talked it over with them and told them how I was going to make this spooler and how it was to be constructed.

"Mr. Caughey: May I inquire of counsel the date of these statements referred to by the witness?

"Mr. Westall: I don't know what they were, since I have taken them. [185]

"Mr. Caughey: In other words, three or four years after the disclosure?

"Mr. Westall: It may be. But, of course, those dates were very carefully checked with various documents which we will produce.

"Q. (By Mr. Caughey): Then, your testimony is that the first device you manufactured, actually made, was on April 5, 1937?"

The witness says, "Yes, sir," but at the end of his deposition, he has corrected it as follows: "April 5, 1937, was not the date I made the device. That was the date I sold the device to Holly Oil Company, having completed it within four days from the date I started making it, November 23, 1936, as I believe I have testified."

"Q. And where was that made?

"A. I made it in my garage at my house in Long Beach.

"Q. Who, if anybody, assisted you to do it?

(Deposition of Perry M. Moss.)

"A. No one.

"Q. Did you show it to anyone while you were manufacturing it and making it?

"A. Why, I took it to the welding shop and had it welded up.

"Q. What welding shop?

"A. There was a welding school on Orange Avenue.

"Q. What was the name of it? [186]

"A. It was a welding school. A fellow by name of Rhodes run the welding school.

"Q. Whereabouts on Orange Avenue?

"A. It is on 17th and Orange.

"Q. In Long Beach? A. Yes, sir.

"Q. And was that subsequent or after April 5, 1937, that you took that to Rhodes to be welded?

"A. That was before April 5, 1936.

"Q. So April 5 is the date when you actually first used it?

"A. Actually first used it, that is correct.

"Q. Where did you first use it?

"A. At Huntington, Holly Oil Company 7A.

"Q. Now, as to that first device that you manufactured and you testify was used on the Holly Oil Company rig, state whether or not that structure had rubber bearings such as shown in your patent and which are identified in your patent as, particularly the drawings, as I believe 6. I am referring to these rubber bearings through which the (handing paper to witness)——

"A. You mean are they the same principle?

(Deposition of Perry M. Moss.)

"Q. No, I am not asking you whether they are the same principle. I am asking you whether they are the same.

"A. The first one I made was six inches long, and after [187] I got the spooler going in the field I lengthened them out eight inches long.

"Q. Referring to the one that was six inches long, how many rubber bearings surfaces did you have in that?

"A. Three; one at the top, one in the middle, and one at the bottom.

"Q. Positions somewhat the same as in Figure 3 of your patent? A. Yes.

"Q. And how did you anchor those bearings in there?

"A. It was anchored in with a bolt on the side for holding them in place so they wouldn't fall out.

"Q. With respect to the size of the drilling line, how did the diameter, cross-sectional diameter, of the groove compare? A. You mean——

"Q. The groove through which the line ran, the groove that was in the rubber bearing?

A. Well, it had about a half inch, I'll say, a quarter inch clearance around it.

"Q. Around it?

"A. That is right, so that the line would have slack to go in.

"Q. And you are talking about a quarter inch clearance when the device was in closed [188] position?"

(Deposition of Perry M. Moss.)

And then at the top of page 49:

"A. Quarter inch on each side.

"Q. In closed position?

"A. Yes, that is right.

"Q. Did that first device have an eye at the top of the structure for attaching the hanging line to it?

"A. Yes.

"Q. And how far up on the derrick did you attach the hanging line?

"A. I went up the derrick just as far as it needed to go to make it line up with the drum on the drilling line. Some drums vary farther than others. That is why you have to go farther so they will line up and be perpendicular and take the friction off your spooler. All rigs are not alike.

"Q. In other words, you attach the hanging line far enough up on the derrick so it was directly over the drum, is that correct?

"A. That is right, and far enough so that the spooler wouldn't have any friction on it.

"Q. You are talking about, as far as being directly over the drum, you are talking about the center of the drum, so far as the width is concerned? A. That is right.

"Q. How about the center as far as the length of the drum is concerned? Did you take that into consideration? [189]

"A. Well, you hang your spooler in the center of the drum. Some drums are wider than others, and you have it line up where it will take care of any width of drum.

(Deposition of Perry M. Moss.)

"Q. Well, isn't it a fact that sometimes the drum will be, not in the center of the derrick so far as the side is concerned, but it will be closer to one side of the derrick than the other?

"A. That is right.

"Q. And in that case you move the hanging line over to line up with it?

"A. To the center of the drum; that is right.

"Q. And you consider that of importance, do you? A. Yes, sir.

"Q. Would this spool as shown in your patent function if it was not hung in that manner?

"A. No, it wouldn't.

"Q. In your opinion, does the length of the line have anything to do with the angle at which the spooler would hang, assuming that there was not any line running through the spooler? In other words, it is my understanding that the reason that you state in your patent that you hang the line from the top, this eye at the top——

"A. That is right.

"Q. Attach it up above, is so that, regardless whether the line is through the spooler or not, it would turn at the [190] same longitudinal angle as the axis of the wire which would be passing through it ordinarily?

"A. Yes, within two or three degrees.

"Q. Within two or three degrees?

"A. Yes.

"Q. Now, does it make any difference in so far as that angle at which the spooler—which it would

(Deposition of Perry M. Moss.)

take from the vertical, as to how high the hanging line is above the spooler?

"A. It wouldn't make any difference. The only thing is, you have got to put this line up here, if you hang a spooler proper where it will line up; instead of tying it over here, you would pull your line back out of position. It has got to be up high enough. As I just got through saying, some drums are here and some there. It has got to be up high enough so it will hang as near as it can hang.

"Q. We have in this model which you have produced and which is a derrick, as I think Exhibit 3, there are nine girts, not counting the top girt; is that correct? A. That is right.

"Q. And the spooler in this model is above opposite the third girt?

"A. That is right; it is the center of it.

"Q. The center of the third girt, the center of the spooler? A. That is right. [191]

"Q. If you attached a hanging line to the fourth girt, would that hanging line function in the manner that you describe in your patent?

"A. Yes. As I just got through saying, some drums are set farther out on the floor than others. Some drums, the fourth girt would be perfect for hanging it.

"Q. So it is your statement that, regardless whether the hanging line is attached to the fourth girt or the fifth girt or the sixth girt or the seventh girt, as shown in your Model Exhibit 3, that the hanging line would function——

(Deposition of Perry M. Moss.)

"A. On the first girt?

"Q. To bring the line spooler in line so that the line spooler would clear not without undue friction.

"A. It would be some friction there. Very little.

"Q. What do you mean by some friction?

"A. Well, there is bound to be friction, to spool the line, because it is a-whippin. You couldn't get away from some friction.

"Q. But your statement is that outside of the friction caused by the whipping of the line, that, if there was not any whipping, it would pass freely through there with your hanging line attached as you state in your patent?

"A. Yes, if you tie it up high enough for it to line up with your drum and where it takes the friction off of your line. [192]

"Q. Well, it is my understanding from your patent that you want to hang that so that it will so hang that there is not any friction on the line, isn't that correct?

"A. There is bound to be some friction. You couldn't get away from some friction.

"Q. Well, let's say that there is some friction when it is attached to the girt to which it is now attached—one, two, three, four, five, six, seven—will you agree there is some friction there?

"A. Yes, sir, there is some. There is bound to be, from the line.

(Deposition of Perry M. Moss.)

"Q. Would there be more friction if it was attached to the sixth girt? A. Yes.

"Q. And would there be still more friction if it was attached to the fifth girt?

"A. Yes, the spooler wouldn't function.

"Q. Wouldn't function at all?

"A. No. If you pulled it back out of line, if you pulled it like there, your rubbers would burn out within two or three stands. If you pulled that back out of line, say, like that (indicating).

"Q. Then you say it wouldn't function?

"A. No, sir.

"Q. Now, Mr. Moss, will you agree that, if the hanging [193] line is attached in the center—let's assume that there was an eye in the center in the model Exhibit 3, if there was not any stabilizer at the side, will you agree that that spooler would assume a horizontal position, if it was in the center?

"A. If you put it here?

"Q. Yes. A. It would lay flat.

"Q. Yes, but it cannot lay flat, can it, when the stabilizer is attached? A. On the side?

"Q. Yes.

"A. No, not exactly flat. It couldn't lay——

"Q. And, as you would put successive eyes between the middle and the top, it would have more of a tendency, it would have the same tendency to come away from the vertical with the hanging line attached, wouldn't it? In other words, instead of having an eye at the center, if you had an eye between the center and where you now have the eye

(Deposition of Perry M. Moss.)

in this model, it would still have a tendency to come away from the vertical with a hanging line attached?

"A. It would help it some. It wouldn't lay flat as quick, but it would help some if you had it raised up part of the way.

"Q. Yes. A. Yes. [194]

"Q. In other words, the angle between the hanging line and the wire rope is very important, is it not? A. The hanging line, you say?

"Q. The angle. A. The angle.

"Q. The angle between the extended hanging line where it meets the wire line through the spooler and the spooler, that angle included between the hanging line and the wire line is very important, is it not? A. That is right.

"Q. Now, does the fact that the line travels in winding on the drum side by side and doesn't have any influence at all upon the way in which the spooler hangs?

"A. Well, it travels back and forth."

Mr. Caughey: I don't think that question was read correctly.

The Court: No; that was misread. Start over again.

Mr. Joseph F. Westall: "Q. Now, does the fact that the line travels in winding on the drum side by side, does that have any influence at all upon the way in which the spooler hangs?

"A. Well, it travels back and forth. The

(Deposition of Perry M. Moss.)

spooler has got to travel backward and forth as the line spools on the drum. [195]

"Q. And changes the angle, does it not, both of the hanging line and of the wire line through the spooler?

"A. It wouldn't change it, no. Nothing changes the hanging of it. It still hangs the same.

"Q. I am talking about the angle.

"A. No, it doesn't change that angle.

"Q. It doesn't change that angle, but it does change the position of the spooler in so far as, and also of the wire line, in so far as the distance from each side of the derrick is concerned?

"A. It changes it because your drum gets filled up with line.

"Q. And how long are those drums, Mr. Moss?

"A. Well, some of them are about three, some of them are about four feet. The old-timers used to make them about five feet wide. But most of them now are around three, three and a half, two, something like that. I never measured one.

"Q. So that we would have a travel line that is on a drum of three or four feet, depending upon what the length of the drum was?"

Mr. Caughey: I don't think you read that correctly.

Mr. Joseph F. Westall: "Q. So that we would have a travel of the line that is on the drum of three to four to five feet, depending upon what the length of the drum was? [196]

"A. The old-timers, many years ago, it was

(Deposition of Perry M. Moss.)

about four and a half, five feet. They use about three feet. It would make that much difference, three feet in the travel of the spooler.

"Q. Now, prior to the time that you actually made one of these spoolers of yours, as you state, on April 5, 1937, did you see any spoolers in operation in the field?" [197]

* * *

Mr. Joseph F. Westall: Just before the adjournment, I had read, or should have read, a correction in the deposition, which is shown at page 93 of the deposition. The answer should be, "I did not make the spooler as assumed by the question on April 5, 1937. That was the date I sold an actual device, which I had completed in November, 1936, to Holly Oil Company. Prior to that time I did not sell any such spooler anywhere."

Mr. Caughey: "See."

Mr. Joseph F. Westall: "See any such spooler anywhere." This correction is made and shown at the bottom of page 93.

The Court: Where are we now?

Mr. Joseph F. Westall: We are on page 57, at the top of page 57.

The Court: Do you want to make a correction now?

Mr. Joseph F. Westall: I just simply have stated that the correction was made and I so read it at the time I read the deposition. At the top of page 57, "Q. Did you know of any spoolers which had been made, or heard of any?

(Deposition of Perry M. Moss.)

"A. I seen some eight or ten years before that, some rough made—impractical. They throwed them out and junked them. [198]

"Q. Have you seen any spoolers which had been put out by Patterson-Ballagh prior to April 5, 1937? A. No.

"Q. Had you heard of the activities of Mr. Reed, who was the inventor of the patent which has been introduced in evidence as Moss Deposition Exhibit 2, prior to that date? A. No.

"Q. When was the first time you ever saw a Patterson-Ballagh spooler?

"A. It was in the—along in 1936, about three days before Christmas, at El Segundo.

"Q. Will you please describe that?

"A. That spooler?

"Q. Yes.

"A. That was a steel cylinder about twenty-eight or thirty inches long, with flanges welded on the side, and those flangles having holes drilled through them to hold it together, and on the side you have the bridle means, which there is a line attached to every bridle. The line goes out to the sides of the derrick, down through a pulley, and the end of that line is attached to a weight on each side of the spooler, and on the top, on the middle of it, it has an eye for a hanging line to hang it in the derrick with, which makes it out of balance and impractical."

Then Mr. Caughey moves to strike "out of bal-

(Deposition of Perry M. Moss.)

ance and impractical." [199] Do you press that motion now?

Mr. Caughey: Yes; I press that motion now. It certainly wasn't responsive.

The Court: That word "dirt" is supposed to be what?

Mr. Joseph F. Westall: It is supposed to be "derrick."

The Court: The last voluntary statement may be stricken or the word "impractical."

Mr. Caughey: And "out of balance." The whole statement, the latter part, is what I was referring to as not responsive.

Mr. Joseph F. Westall: You didn't move at that time to strike out "out of balance,"

The Court: He has a right now to make that objection or motion. I suppose you reserved your objections when you took the deposition?

Mr. Joseph F. Westall: That may be so.

The Court: That may be stricken, "out of balance and impractical."

Mr. Joseph F. Westall: "Q. Now, you state that date was what when you saw this?

"A. It was in 1936, about three days before Christmas.

"Q. And where did you see it?

"A. At El Segundo.

"Q. What well?

"A. On the Republic Oil Company. I don't just remember [200] what well it was.

"Q. Did you examine that spooler?

(Deposition of Perry M. Moss.)

"A. No, sir; it was up in the derrick.

"Q. Did you ask whose spooler it was?

"A. I did not.

"Q. Did you know whose spooler it was?

"A. No.

"Q. How did that spooler compare with the drawings of the Reed Patent Exhibit 2?

"Mr. Westall: What are you talking about?

"Mr. Caughey: I am talking about the one that he saw in December, 1936.

"The Witness: This is it right here (producing a paper).

"Q. (By Mr. Caughey): In other words, as far as you can tell, it is substantially the same as that shown in Figure 2 of the Reed patent, is that correct? A. That is right.

"Mr. Westall: What was the date of that?

"The Witness: December, 1936, just three or four days before Christmas.

"Q. (By Mr. Caughey): Now, Mr. Moss, did that device that you saw at that time have any lower safety line on it, that is, a line leading attached to the lower part of the spooler and to a lower girt below the spooler?

"A. I didn't see any, no. [201]

"Q. You just saw the hanging line above?

"A. That is right.

"Q. And how high was that hanging line above the spooler?

"A. I didn't pay a whole lot of attention. It was four or five girts above the spooler.

(Deposition of Perry M. Moss.)

"Q. And the ordinary distance between girts is about 10 feet?

"A. It is, roughly speaking, I would say, about seven and a half or eight feet.

"Q. So it was at least thirty feet above the spooler, is that right?

"A. Yes, approximately."

Beginning with page 60:

"Q. And was that line taut, that hanging line?

"A. It was tight.

"Q. A taut line? A. Yes.

"Q. Did you ever see a spooler in the field subsequent to December, 1936, which had three eyes, one at the top, one in the middle, and one at the bottom?

"A. The first one I seen was in October, along in 1937.

"Q. And was that a cast iron spooler—cast spooler?

"A. It was up in the derrick. I don't know.

"Q. You don't know?

"A. I don't know. [202]

"Q. And where was the hanging line attached in that device? A. On top.

"Q. And was there a lower safety line attached to the lower spool? A. There was."

And here was another correction that he made, at page 94, which I shall put in if counsel doesn't object. To the question, "Was there anything attached to the middle spool?" he answered, "No."

(Deposition of Perry M. Moss.)

but, when he corrected it, he added, "not to the middle eye, if that is what you mean."

"Q. Where was that well that you saw that on?

"A. That was for the Taft Well Drilling Company at Rosecrans.

"Q. In Rosecrans. That is the closest information you can give, is that right?

"A. That is right. They are broke now and out of the picture, they say.

"Q. It was installed and in operation, was it?

"A. That is right.

"Q. Did you make any inquiry as to how long it had been installed?

"A. No, I didn't ask any questions.

"Q. You didn't ask any questions at all?

"A. No. [203]

"Q. And I think you previously stated that you didn't get up in the derrick and look at it closely, is that right? A. No.

"Q. So therefore you don't know whether there was any name stamped on it or not? A. No.

"Q. And was the hanging line taut in that device? A. Yes.

"Q. And how about the lower safety line, was that a loose line? A. It was a loose line.

"Q. Now, one of the purposes for having a hanging line, regardless where it is attached, is to prevent the spooler from riding down on the wire rope, isn't that so? A. That is right."

Then, at the top of page 62:

"Q. Because, otherwise, it might go down so far

(Deposition of Perry M. Moss.)

as to drop weights into the ground or so that they would hit something solid?

"A. If the safety line didn't catch it, yes.

"Q. In other words, if the lower safety line didn't catch it?

"A. That is right, if this hanging line broke, if it didn't catch it.

"Q. And the function of the lower safety line is not [204] only to catch it if it goes down, but it is also to prevent the spooler from riding up on the line?

"A. That is right; it answers as a safety line and a hold-down line."

Then, near the bottom of page 62:

"Mr. Westall: Mr. Moss wanted to make a statement about one of his answers.

"Mr. Caughey: All right.

"The Witness: Mr. Caughey, if I made a statement I made my spooler before I seen the Reed patent, that is wrong. I started making my spooler November 23, 1936. I got the stuff to make it with the same day from Mr. Terry at Huntington Beach."

At the top of page 63:

"Q. (By Mr. Caughey): But you never completed it?

"A. I completed it within four days and took it back down to Huntington Beach, and Mr. Terry seen it, and Mr. Mack—I will call him, I don't know his other name—they seen this spooler completed without the bearings. I took the spooler

(Deposition of Perry M. Moss.)

down, thinking I would put some of that eucalyptus hardwood in the spooler for the bearings, and I changed my mind, I didn't use the eucalyptus hardwood, and I got some old rubber core pushers and put in for rubber liners. I got mixed up when I sold the first one. That is where I got my dates mixed up. That is correct. I can prove it by two witnesses. [205]

"Q. Your present testimony is then that April 5, 1937, was the date you first sold one, is that correct?

"A. I put it on the rig for a trial. Mr. Anderson bought it within three or four days—in fact, he bought two the same month.

"Q. How soon after you put it on the rig for a trial did you sell it?

"A. We decided in three or four days he would take it, and he started another well in Wilmington, California. Holly——

"Q. Then it is your present testimony that around November 23, 1937, that you actually made a spooler and took it down to Huntington Beach without the bearings in it?

"A. My date was November 23, 1936.

"Q. '36—beg your pardon. I didn't mean to confuse you.

"A. Mr. Terry gave me the stuff to make the spooler with—in fact, I got the stuff from him. I brought it to Long Beach and took it to the shop and I had it milled and took it home and lined it up. I said nobody seen it. The welder seen it. I

(Deposition of Perry M. Moss.)

took it to the welding shop and had him weld it up, and the fourth day after Mr. Terry gave me the pipe I taken it back down to Huntington Beach and that is when I was going to put the bearings in. That was the 27th of November when I took it back down and Mr. Terry seen it and a fellow by name of Mack. [206]

"Q. Did you actually try that out on a well?

"A. That was the spooler I sold Mr. Anderson, the first one.

"Q. On April 5, 1937? A. Yes.

"Q. What did you do between November 27 and April 5, 1937, in so far as trying it out? Where was it?

"A. Well, he bought that one on that rig, that was for the Holly Oil Company, and I sold one for the Holly Development.

"Q. When you say 'he,' to whom do you refer?

"A. Mr. Anderson."

At the top of page 65:

"Q. Is Mr. Anderson the one you showed it to on November 23, 1936?

"A. No, sir, he didn't see it. Mr. Terry.

"Q. All right. Now, my question is, between November 23, 1936, and April 5, 1937, what, if anything, did you do in connection with trying out the spooler?

"A. I didn't try any because I didn't want to put it on a rig before I knew the men, so it would get a fair chance.

(Deposition of Perry M. Moss.)

"Q. Didn't you know the men down at Huntington Beach—Mr. Terry?

"A. Yes, I knew him.

"Q. Why wouldn't that rig have been satisfactory? [207]

"A. Mr. Terry was a gang pusher. He didn't have anything to do with the drilling.

"Q. Now, when you tried it out on April 5, 1937, what kind of bearings were in the spooler?

"A. They were rubber bearings.

"Q. And you changed the bearings in the meantime?

"A. No, I took it down to Huntington Beach to make the hardwood bearings out of the eucalyptus hardwood. That is when Mr. Terry and Mr. Mack seen it, and I changed my mind; I got some old rubber core pushers to put in to try out.

"Q. Were those same rubber core pushers in it when you sold it to Mr. Anderson? A. Yes."

At the top of page 66:

"Q. Then, as I understand your testimony, you never actually tried out the spooler on a rig, installed on a rig with the counterweights attached and the hanging line attached to the derrick, until on or about April 5, 1937?

"A. That is right.

"Q. In other words, the whole installation was not complete on a rig until that date?

"A. Yes, it was complete, the spooler was complete, made complete.

"Q. On a rig?

(Deposition of Perry M. Moss.)

"A. On a rig, that is right. [208]

"Q. Did you take any counterweights down to Huntington Beach with you in November, 1936?

"A. I took the whole thing, the pulleys and all, the whole complete setup as it is.

"Q. Did that include the counterweights?

"A. Yes, sir.

"Q. What was the weight of the counterweights? A. About forty pounds.

"Q. Forty pounds each? A. Each.

"Q. And what was the weight of the spooler?

"A. A hundred pounds, around a hundred pounds. I never did weigh it up until I got my patent.

"Q. And what were the counterweights made of—just solid iron?

"A. Piece of pipe filled with cement."

At the top of page 67:

"Q. How did you determine what counterweights to use?

"A. By being a practical man in the field, I figured that would be just about right, with the old chain they used to use.

"Q. The old chain they used to use as a dampener, you mean?

"A. Yes, or line guide, either one you want to call it.

"Q. Well, now, between the date you made the disclosure, [209] as you testified on the invention in May, 1936, and the date when you testified you commenced manufacturing or making the spooler

(Deposition of Perry M. Moss.)

in November, 1936, what, if anything, did you do?

"A. At the time I mentioned it to Mr. Anderson, I had it in mind. I didn't do anything until I got the thing pictured in my head how I was going to make it, and November 23, as I said, I went down to Huntington Beach and I got the stuff November 23, 1936. I got the stuff from Mr. Terry to build it with, the gang pushers.

"Q. Then, what you actually disclosed to Mr. Anderson in May, 1936, was really the idea of having a spooler. You didn't explain the construction to him, did you?

"A. Very thoroughly. I explained it very thoroughly.

"Q. Why did you have to have all that time to get an idea how you wanted to make it if you had it very thoroughly in mind?

"A. Well, I wanted to put it on a rig, as I just stated, where I knew somebody and it would get a fair chance, a fair trial.

"Q. That is the best answer you can give to the question? A. Yes.

"Q. Did you explain to Mr. Anderson the importance of placing the hanging line and eye or socket at the top of the spooler? [210]

"A. I did.

"Q. And when did you do that?

"A. When I made the—when did I explain to Mr. Anderson?

"Q. Yes. A. April 16, 1936.

"Q. You are sure it was not May 16, 1936?

(Deposition of Perry M. Moss.)

"A. No, sir, it was in April, the 16th, 1936. Or May, 1936.

"Q. Now which one was it?

"A. It was May 16, 1936.

"Q. You are sure of that? A. Yes, sir.

"Q. It was not April? A. No, sir.

"Q. Then you were mistaken?

"A. I was mistaken.

"Q. Did you make any drawings of this spooler prior to November, 1936?

"A. I didn't make any drawings.

"Q. Did you make any subsequent to it?

"A. No.

"Q. Then the first drawing that was made of the spooler was the one that was in the patent application, is that right?

"A. That is the first one that was made. Only that [211] shop school I told you about; he made a rough drawing, a shop drawing of it.

"Q. You are talking about the shop, you are talking about Mr. Rhodes, is that right?

"A. That is right, Rhodes; he made a shop drawing of it roughly himself, voluntarily.

"Q. And that was in April, 1937?

"A. I just don't say what date that was. There was two or three spoolers made. I had already made two or three spoolers when he made this shop drawing.

"Q. So you can't give that date?

"A. I don't recall whether there was a date on the shop drawing when he give it to me or not.

(Deposition of Perry M. Moss.)

"Q. Do you still have that shop drawing in your possession? A. My attorney has it.

"Mr. Caughey: May I inquire from counsel whether there is a date on that shop drawing?

"Mr. Westall: I don't remember, Mr. Caughey. I haven't the shop drawing here because I didn't think it would be of very great importance in this examination. If it is, I will produce it later.

"Mr. Caughey: If I wish to have a photostatic copy of it at any time, will you be willing to furnish it?

"Mr. Westall: I think so. I think I can furnish a copy [212] of it.

"Q. (By Mr. Caughey): Now, in your patent, Mr. Moss, which is Exhibit 1, at the bottom of the first page, the second column, and running over onto the second page, first column, it reads as follows: 'As the number of layers of cable helices increase or decrease on the drum 3 the slant of the line will vary consequently.'

"A. Yes, in size.

"Q. Will you explain what you mean by that statement and, if necessary, refer to the model?

"A. Well, if the drum—we will demonstrate this way, as a spool of thread, we will put it; when that travel block is down to the floor to pick up a stand, that drum has about a wrap and a half on it. When it gets up to the top of the derrick after another stand, it has six or seven wraps, makes it six or eight inches or a foot bigger, when your block is at the top of the derrick after another stand."

(Deposition of Perry M. Moss.)

At the top of page 71:

"Q. That is true. You say the slant of the line will vary consequently. How will that increase in thickness of the rope on the drum vary the slant of the line?

"Mr. Westall: Are you talking about the length of it or the thickness?

"Mr. Caughey: Talking about the statement in the patent. That is what I am talking about. [213]

"Mr. Westall: Well, that statement in the patent says that the increase or decrease on the slant of the line will vary consequently as the number of the layers on the drum.

"Mr. Caughey: That is right.

"The Witness: That is right.

"Mr. Westall: The number of layers—it will get thicker.

"The Witness: That is right, it will get thicker.

"Mr. Caughey: That is right, the number of layers will get thicker, I agree with you, sir.

"A. Yes.

"Q. But is it your opinion that that will vary the slant of the line?

"A. Two or three degrees, not enough to notice it any to affect the spooler.

"Q. And you would have to take in the height of the derrick also, wouldn't you?

"A. That is right.

"Q. What are the heights of these derricks, approximately?

(Deposition of Perry M. Moss.)

"A. Some of them is 122 and some is 136 and so forth and so on; they vary in height.

"Q. Now, the whipping in the line, then the whipping in the line depends not only on the height of the derrick but also the weight of the line, doesn't it? A. Yes and no. [214]

"Q. Well, explain your answer.

"A. Well, regardless of the size of the line, it would whip and the wave in it, but the heavier the line would be, it would be harder to dampen it. There would be more friction and harder on your spooler.

"Q. That may be so, but I was talking about whipping. I am not talking about dampening.

"A. The weight of the line, there wouldn't be enough difference to notice it in the whipping.

"Q. You don't think as far as the weight of the line is concerned it would have any appreciable effect on the whipping?

"A. No, not enough to notice it.

"Q. How about the height of the derrick?

"A. That would affect it some more or less. But, regardless, the spooler or how much the whip is, when it passes through that spooler, the idea of that spooler is to iron out those whips; when it goes through the spooler and onto the drum, those waves are smoothed out of it and smoothed on the drum."

At the top of page 73:

"Q. Does the length of the spooler have any effect on the dampening of the waves?

"A. Well, yes and no.

(Deposition of Perry M. Moss.)

"Q. All right, let's assume—— [215]

"A. Pardon me.

"Q. All right, go ahead.

"A. As I said, mine was four feet. That is what I decided on. One three feet would do practically the same in the length.

"Q. Suppose it was a foot?

"A. A foot? Well, you wouldn't get very good results. Like the old chain, you wouldn't get the waves ironed out. I never seen one demonstrated of a foot. That is my idea. But I don't think so.

"Q. I am just asking you about what the effect would be of one.

"A. I never demonstrated one. I don't know. But it seems to me it wouldn't do a good job that short.

"Q. How about eighteen inches, what would be your opinion?

"A. Well, eighteen inches, it would be practical.

"Q. What is your opinion as to whether the size of the diameter of the wire line as compared to the size of the groove is concerned, whether that would have any effect upon the dampening?

"A. You mean the hole in the rubber?

"Q. That is correct?

"A. Yes. As the rubber gets wore out and it gets sloppy, you don't get good results as you would if the rubber [216] was new, and I said before it would be a quarter-inch clearance around that line, not on one side, but all the way around it. You

(Deposition of Perry M. Moss.)

would get better results than if the rubber was half wore out or wore out.

"Q. You mean there would be larger clearance when the rubber is worn out?

A. That is right.

"Q. And in your opinion a quarter-inch clearance will give you the best results?

"A. That is right. But they usually wear them out until they get them wore down—the companies do.

"Q. Suppose the clearance or the bore through the spooler is approximately the same as the outside diameter of the wire line, what would be your opinion as to whether that would effectively dampen the vibrations?

"A. You mean the line being the same size as the hole in the rubber? A. Yes."

The Court: May I interrupt at this time? What is meant by the expression "dampen the vibrations"?

Mr. Joseph F. Westall: It keeps them from vibrating.

The Court: I see the word "dampen" used frequently.

Mr. Joseph F. Westall: It just cuts them down and irons them out.

Mr. Caughey: It smooths them out. [217]

The Court: The word "dampen" means to soften or to eliminate, does it?

Mr. Caughey: Yes.

Mr. Joseph F. Westall: When they go through the spool, they are eliminated.

(Deposition of Perry M. Moss.)

"A. If it was the same size, you wouldn't have any clearance. It would squeeze it together. Therefore, you would have a friction hold on it and chances are if you have a friction hold you burn the clearance, so that the line would run through the spooler. The chances are you would break this hanging line.

"Q. You don't think it is practical not to have clearance? A. It is practical to have clearance.

"Q. In other words, you should have clearance?

"A. That is right. That is practical.

"Q. You think it is not practical not to have clearance? A. That is right.

"Q. You talk about burning it. What do you mean by that?

"A. Well, you spoke as a hole in the rubber is the same size as the line.

"Q. Yes.

"A. You wouldn't have any clearance then, would you?

"Q. No. [218]

"A. Well, you would have to pull your blocks up and down, and if this line would hold long enough and the hanging line wouldn't break the friction from pulling the line through it would burn that rubber enough so you would have a clearance.

"Q. Let's assume you burned it enough so that you do have a clearance and the hanging line holds just enough so that you would have a clearance, do you think that would be a practical device then?

"A. No.

(Deposition of Perry M. Moss.)

"Q. When you would have a spooler where you just had clearance after burning it in and you had the hanging line, do you think that hanging line would function the same way your hanging line as shown in the patent? A. After it is burned?

"Q. After it is burned and just does clear?

"A. It would burn its clearance if this line would hold out.

"Q. Yes.

"A. Within a short time, within ten or fifteen stands, it would burn enough clearance, if you had it that tight so that it would do its proper function.

"Q. You think it would function?

"A. If this hanging line didn't break.

"Q. Yes. But it is your opinion the hanging line would [219] probably break?

"A. Like you are talking, yes.

"Q. Now, frequently, they have more than one line spooling rig, don't they?

"A. Once in a great while you see two. I have never seen two on a rig. I have seen the pictures with two, but I have never seen two spoolers on a rig.

"Q. So then you don't have any practical experience at all as to whether two spoolers have ever been used on a rig?

"A. No, only the pictures. I have never seen them. I have been out in the field until I got sick, every day, even through Texas and through the Mid-Continent and down in Louisiana.

"Q. Now, you made a statement that the struc-

(Deposition of Perry M. Moss.)

ture shown in the Reed patent, the spooler shown in the Reed patent, wherein the spooler had an eye socket in the middle and the hanging line was attached there, that that was not a practical device.

"A. No.

"Q. Would you please explain why you made that statement? What is your opinion as to that and give the reasons?

"A. Well, the spooler is out of balance.

"Q. What do you mean by out of balance?

"A. Out of balance. Hanging this spooler from here, the weight of it, it weighs a hunderd pounds, and this hanging [220] line got the weight of the spooler at all times, it would make friction on the top and bottom of your spooler, and therefore you wouldn't have a balanced spooler and you wouldn't get good results.

"Q. Is it your opinion that the hanging line is the only thing that supports the spooler?

"A. This hanging line is the only thing supports it to hang in the derrick.

"Q. What do the counterweights do?

"A. The counterweights is to stabilize and give you vibration back and forth as those coils go back and forth across the drum.

"Q. Do you mean to say if the hanging line was taken off there the spooler wouldn't be supported?

"A. No, sir.

"Q. Are you sure of that statement?

"A. No, sir, it wouldn't be supported.

(Deposition of Perry M. Moss.)

"Q. What would it do? Would it go all the way down to the floor of the derrick then?

"A. There is no oil man or driller with any ability would put that spooler up without this hanging line. The State Safety Commissioner, I feel definitely, wouldn't allow it.

"Q. I don't know what the State Safety Commissioner would do and I don't think we had better speculate on that. [221] A. O. K.

"Q. But you have never seen any spoolers in the field without hanging lines on them?

"A. No, sir.

"Q. And it is your opinion that if the hanging line was off that the counterweights wouldn't support the spooler on the line?

"A. No, sir. It would drop partly down and it would be unsafe.

"Q. How far do you think it would drop down?

"A. Well, it would drop down, we will say, a couple of feet from where it is hanging, and it would be flopping in the rig like a car loose on the street. It would be a death trap.

"Q. It would drop down a couple of feet?

"A. Well, I have never seen one run that way. That is my guess. We can turn it loose and see how far it would drop.

"Q. Well, wouldn't the line at the center prevent it from dropping down just as well as the line at the top? A. You mean this hold-down line?

"Q. No.

"A. You mean the hanging line?

(Deposition of Perry M. Moss.)

"Q. The hanging line from the center as shown in the Reed patent, wouldn't that prevent it from dropping down just the same as the line from the top? [222] A. Yes.

"Q. Then in so far as preventing it from dropping down, they have the same function, don't they?

"A. From dropping down, it is the same function, yes, sir.

"Q. So as far as the hanging line being practical to accomplish the result of preventing it from dropping down, they are just about the same, whether it is in the middle or whether it is at the top, they both do that?

"A. They both keep it from dropping down.

"Q. Where is it impractical then to attach the line at the center?

"A. Because, if your spooler is not practical, your spooler is out of balance, makes friction on the top and bottom of your spooler.

"Q. In other words, you are saying that the line at the center would cause the spooler to tilt so that it would make friction both at the top and the center, is that right?

"A. Both at the top and center, that is right. If you wish, I will tie it at the center and show you.

"Q. I understand what you mean. But will you agree that it would be less friction than if there were no hanging line at all?

"A. No, it would be more friction than ever.

"Q. It would be more friction if it were at-

(Deposition of Perry M. Moss.)

tached to [223] the center than if there was not any hanging line at all?

"A. If there was not any hanging line at all. This hanging line has got to be attached to hold that line and spooler, regardless, at the top and bottom at all times, to make it function properly.

"Q. Let's assume you didn't have any hanging line. A. O. K.

"Q. Let's make that assumption, and let's assume that the wire line is through the bore of the spooler and that the counterweights are sufficient to hold it in place with the two-foot sag that yau talk about, let's assume that; is there more friction on the line when there is no hanging line as I have assumed, or when the hanging line is attached to the center as shown in the Reed patent?

"A. Is there more friction on the center, as I get you right, on the Reed patented derrick from the top hanger—is that the question?

"Q. No, that is not the question.

"A. Will you please repeat it?

"Q. I will try to make it clear. Maybe I didn't make it clear. Assume, in the first place, that there is no hanging line at all, let's make that assumption, and that the wire line is going through the spooler and that the spooler is substantially kept in position by the counterweights. Let's assume that. [224]

"A. Yes.

"Q. Now, there would be a certain amount of friction on the line, between the line and the spooler, wouldn't there?

(Deposition of Perry M. Moss.)

"A. You still are talking about this hanging line, aren't you?

"Q. No, there is no hanging line at all.

"A. You don't want any hanging line?

"Q. No.

"A. Yes, there would be more friction—some, but very little with that hanging line.

"Q. Forget the hanging line. I am not talking about the hanging line.

"A. You are talking about just the weights holding it up?

"Q. That is right.

"A. Yes, there would be more friction.

"Q. Where would that friction be in so far as the top, the middle or the bottom of the spooler is concerned? A. It would be on top and bottom.

"Q. All right. Now, we will take a situation where we have the spooler in place with the counterweights and the bridle and we have a hanging line attached at the center, as in the Reed patent; there would be a certain amount of friction then, would there not? A. Yes. [225]

"Q. And I believe you previously testified that friction would be at the top and the bottom?

"A. Top and bottom.

"Q. Is there more friction in the first case I assumed, or where there is a hanging line in the center?

"A. The first one without the counterweights—with the counterweights.

"Q. And no hanging line?

(Deposition of Perry M. Moss.)

"A. And no hanging line, would be more; would be but very little difference, but would be a little more with the counterweights without the hanging line, but there would be very little difference.

"Q. If we raise that socket up so that it is halfway between the middle and the top, then there would be less friction, would there not?

"A. Yes, there would be less friction. That would take part of the friction off it, make it have a tendency to hang straight.

"Q. When you say hang straight——

"A. Hang perpendicular with the line, the same degree as the line, as near as you can get it, it would help some.

"Q. And would it make any difference in so far as the friction on the spooler is concerned or between the line and the spooler, whether the spooler had moved to the right or to the left? [226]

"A. There would be some, but very little.

"Q. And that spooler does move from the right to the left, depending upon the winding of the drum, does it not? A. Yes.

"Q. Have you ever seen a case where a derrick was out of balance, tipped or something, where it had a spooler in it?

"A. No, sir. They don't run them that way.

"Q. You would be surprised?

"A. I never seen a derrick tipped and the rig fall over yet, being run.

"Q. I didn't say fall over.

"A. You said tipped. Not the derrick—it is

(Deposition of Perry M. Moss.)

never tipped.

"Q. Sagging on one side?

"A. Well, if it is tipped, sagging on one side, they couldn't run it. It would be dangerous. They would have to fix it.

"Q. You stated you are ill at the present time?

"A. That is right.

"Q. How long have you been ill?

"A. I have been ill for about six months.

"Q. Prior to that time you were in good health?

"A. Not in good health, no. I have been ill for about six months. I would go out in the field from time to time, but I have been under the doctor's care constantly for the [227] last two months, with my feet up in the air and in my bed, elevated at eighteen inches, and lay flat on my back, with no pillows, and I came up against my doctor's protest. I said I had to go, because I didn't feel I had very long left, and I wanted it for the wife.

"Q. I don't want to go into detail of your sickness. A. That is the fact.

"Q. I merely asked you how long it had been, because that has a bearing on what I want to ask you. A. O.K.

"Q. Now, you stated Mr. Cameron was killed in an automobile accident, I believe, in 1942 or some such time? A. That is right."

At the top of page 85:

"Q. Did you go to another attorney after he had been killed? A. Yes; Mr. Westall.

"Q. How soon thereafter?

(Deposition of Perry M. Moss.)

"A. About three years.

"Q. You knew, did you not, Mr. Moss, prior to the issuance of your patent, that Patterson-Ballagh was manufacturing devices such as shown in the Reed patent and you had information which led you to believe that they were probably hanging those from a top socket? You knew that, didn't you?

"A. I never seen a Patterson-Ballagh line spooler until [228] I got my line spooler made.

"Q. That was not my question.

"A. Let's have it again, please.

"Q. My question was, prior to the issuance of your patent, which was in 1940, February 20, 1940, you were fully familar with the fact that Patterson-Ballagh was manufacturing and selling line spoolers, wherein you had good reason to believe they were fastening the hanging line from the top?

"A. 1940, did you say?

"Q. Prior to the issuance of your patent, prior to that. A. Yes.

"Q. You knew that?

"A. I knew that. As I stated in my early statement, two or three days before Christmas in 1936.

"Q. And you knew from the time that you sent this, or had Mr. Cameron send this notice to Patterson-Ballagh in 1940 and up to the time that you filed the action, you knew they were continuing to manufacture line spoolers which you claimed to be an infringement; you knew that, did you not?

"A. Yes.

"Q. Now, you referred to seeing certain advertising which you were of the opinion was put out

(Deposition of Perry M. Moss.)

by Patterson-Ballagh, and your attorney has offered in evidence certain [229] advertising material which you examined. Of that advertising material, what had you seen prior to the time that these notices of infringement were sent out?

"A. What part of the spooler?

"Q. What particular advertising had you seen?

"A. I first noticed the advertisement in October, 1937, and, as I said, by seeing them in the field.

"Q. That advertisement in 1937, what was that in—do you recall?

"A. I don't recall. I have it. I don't recall. These photostats out at the library at Long Beach. I can get the books.

"Q. I am not asking you where they are. I am asking you when you saw them.

"A. Yes, that is when I saw them.

"Q. Did you see any other advertising prior to the sending of this notice of infringement other than the October, 1937?

"A. Only the Reed patent. I seen it advertised. I seen it in the field.

"Q. So you actually saw it in the field?

"A. And seen it advertised, yes.

"Q. And, as you testified, you didn't know who was putting out that structure, you didn't even make any inquiry, did you? [230]

"A. No, I didn't make any inquiry.

"Q. Well, what led you to believe it might be Patterson-Ballagh?

(Deposition of Perry M. Moss.)

"A. Not when I first seen the first one, but when I began to see them, I began to ask, 'Who is putting that spooler out?'

"Q. When did you first inquire as to who was putting that particular spooler out—what time?

"A. Well, it was along the first part of 1937, the first month. I don't know just what date it was, though.

"Q. And when you found out, it was Patterson-Ballagh that was supposed to be doing it?

"A. The man said on the rig it was Patterson-Ballagh Corporation."

At the top of page 88:

"Q. Did you ask them at that time how long they had been using them? A. No.

"Q. Did you make any inquiry otherwise as to how long Patterson-Ballagh had been manufacturing and selling this spooler which was, as you testified, appeared to be substantially the same as the drawing of the Reed patent?

"A. No, I made no inquiry. I just read the advertising and seen them in the field and the date on their advertisement. [231]

"Q. When did you first see a line spooler which you believed was manufactured and sold by Patterson-Ballagh where the hanging line was hung from the top of the spooler? When did you first see that?

"A. I seen that it was 1937, the last part of the year. I just don't recall what date it was. At Rosecrans on a Taft well drilling rig.

(Deposition of Perry M. Moss.)

"Q. Did you make any inquiry as to how long they had been hanging the line from the top?

"A. No.

"Q. Did you talk to the men on the rig about it?

"A. No, I didn't know the men.

"Q. Did you see any subsequent line spoolers hung in that fashion after 1937?

"A. You mean did I see any?

"Q. After you saw the first one.

"A. Did I see any difference in them, you mean?

"Q. No, I am not asking you that. After you saw the first one, did you see some more in the field? A. Yes, I saw some more.

"Q. At any time did you make any inquiry from any persons who were associated with the rig in which those were hung, did you make any inquiry as to how long they had been using them or why they were hanging them that way?

"A. No, because I knew from being an oil man the spooler [232] had to be hung to get the——

"Q. In other words, you knew as a practical man in the oil field seeing that spooler, would know that it should be hung from the top, is that right?

"A. That is right. If they take that spooler out and throw it on the dirt floor, with the three hangers on it, any practical oil man would hang it from the top hanger.

"Q. And any practical oil man would know, would he not, if it had just a hanger or socket in the middle, that it would be better to hang it from the top? A. That is right.

"Mr. Caughey: That is all.

(Deposition of Perry M. Moss.)

"Redirect Examination

"By Mr. Westall:

"Q. You have just stated that any practical man would know that the hanging line should be at the top of the spooler. Would any practical man, before you incorporated in your application and your patent, would any practical man have known it before that time, before you invented it?

"A. Well, it was not practical to put it in the middle.

"Q. It was not practical to put it in the middle?

"A. That is right. I have witnesses where the old ones have been cut off and put on top. I have witnesses where the old Reed patent was cut off by the oil men and put on top and used it, so it would be balanced. Do you want the [233] names and the companies?

"Q. Well, when did they say that, when did that occur that they said they did. Was that before your invention?

"A. That was after my invention.

"Q. Yes. A. Yes.

"Q. You say any practical man before your invention would know that should be hung from the top, particularly when they manufactured the Reed with it hung from the middle for a long time?

"A. That is right, any practical man would know the spooler wouldn't balance, and hung it from the top.

"Q. After you invented it?

(Deposition of Perry M. Moss.)

"A. After I invented it, that is right.

"Q. And they didn't know it before you invented it? A. That is right.

"Mr. Caughey: Just a minute. You know as well as I do that isn't proper examination.

"Mr. Westall: No, I don't think so.

"Mr. Caughey: I will leave it to the court.

"Mr. Westall: He has testified. He hasn't specified the time. He now specifies.

"Mr. Caughey: Well, you ask him the time by proper and not leading questions.

"Mr. Westall: He is now testifying they didn't know that [234] before he invented it.

"Mr. Caughey: Well, you are not cross-examining him.

"Mr. Westall: No, I am asking redirect.

"Q. Then when did any practical man in the oil field know that it should be hung up with respect to the date of your invention of this device, when with respect to it?

"A. Well, you could see them in the junk pile, the first Reed patent.

"Q. No, I mean——

"Mr. Caughey: Let him answer, please.

"The Witness: The first Reed patent, most of the companies abandoned and they are in the junk pile. There was some few cut off that hanger in the Reed patent and put it on top so it would balance, after I made my spooler. I never seen one that was cut off and put on the top until I made my spooler and put it out with the hanger on top.

(Deposition of Perry M. Moss.)

"Mr. Westall: That is all.

"Mr. Caughey: That is all.

"The Witness: May I be excused to go home?

"Mr. Westall: Yes.

"The Witness: Thanks a lot."

Now, we have over here these corrections which the witness made, which maybe I should read, but they have been inserted as we went along.

The Court: I think I have made note of [235] those.

Mr. Joseph F. Westall: Shall I read them?

The Court: Yes. You might turn to the pages and see if we have them.

Mr. Joseph F. Westall: This is page 93:

"I, Perry M. Moss, who gave the foregoing deposition, as stated in the notary's certificate, have read the said deposition and wish to make the following corrections:

"(1) Page 3, line 21: Strike out the words 'rejected me' and insert in lieu thereof 'objected to my.'

"(2) Page 5, line 14: Strike out the words 'it is hung' and insert in lieu thereof 'the drilling line is spooled.'

"(3) Page 19, line 5: Strike out the words 'in the dirt' and insert in lieu thereof 'on the girt.'

"(4) Page 19, line 17: Strike out the words 'crown in the rig' and insert in lieu thereof 'to a girt of the derrick.'

"(5) Page 46, line 17: Strike out the answer

(Deposition of Perry M. Moss.)

'Yes, sir' and insert in lieu thereof 'April 5, 1937, was not the date I made the device. That was the date I sold the device to Holly Oil Company, having completed it within four days from the date I started making it, November 23, 1936, as I beileve I have testified.'

"(6) Page 57, line 1: Strike out the words 'No, sir' and insert in lieu thereof 'I did not make the spooler as assumed by the question on April 5, 1937. That was the date [236] I sold an actual device which I had completed in November, 1936, to Holly Oil Company. Prior to that time I did not see any such spooler anywhere.'

"(7) Page 58, line 3: Cancel 'dirt' and insert in lieu thereof 'derrick.'

"(8) Page 60, line 20: Delete the period and add 'such a line attached to the lowermost eye on the spooler.'

"(1) Page 60, line 22: Delete the period and add 'not to the middle eye, if that is what you mean.' "

And that is the end.

The Clerk: We seem to have one more exhibit here, No. 5, but there is no reference in the transcript to it.

Mr. Joseph F. Westall: I will find it. No. 5 was a Wall Street Journal dated April 22, 1936, and we offer it in evidence. It was Moss Exhibit 5 and we now offer it in evidence on the trial of this

The Clerk: It was marked No. 5 by the notary

case as Plaintiffs' Exhibit 5.
but I could find no reference to it in the deposition.

Mr. Caughey: It was the Ballagh deposition. May your Honor please, I don't think it is very important. That is just an announcement in the Wall Street Journal that Byron Jackson acquired the assets of the Patterson-Ballagh Corporation and subsequently an amended answer was filed. I don't see what an announcement of the Wall Street Journal would be worth. [237]

Mr. Joseph F. Westall: We used that to refresh his recollection.

Mr. Caughey: No; it wasn't used for any such recollection.

Mr. Joseph F. Westall: He didn't know the date but that showed approximately the date.

Mr. Caughey: It was admitted at the time Mr. Ballagh or was offered at the time Mr. Ballagh's deposition was taken and, in view of the fact that Mr. Ballagh's deposition wasn't offered here, of course, it wouldn't appear.

The Court: Is there any objection?

Mr. Caughey: It is really immaterial.

The Court: We can't all make the front page of the Wall Street Journal.

Mr. Caughey: No, your Honor. But I don't think it is of any importance.

The Court: It may be received and marked Plaintiffs' Exhibit 5. That fact has already been put in evidence.

Mr. Joseph F. Westall: Yes; covered in evidence. Now, if Mrs. Moss will take the stand.